91-459

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Case No. _____

IN THE UNITED STATES SUPREME COURT

October, 1991

JOE NELSON and MARGARET NELSON,

Petitioners,

v.

PRODUCTION CREDIT ASSOCIATION
OF THE MIDLANDS,

Respondent.

PETITIONERS' APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JOSEPH NELSON, et al.,

Plaintiffs,

v.

PRODUCTION CREDIT ASSOCIATION OF THE MIDLANDS,

Defendant.

CV88-L-238

JUDGMENT

Jury verdicts having been received on May 26, 1989, on the plaintiffs' claim for damages and the defendant's claim for money due on promissory notes,

IT IS ORDERED that the plaintiffs shall recover from the defendant the amount of $1,278,000.00, together with interest at the rate of 9.15 percent per annum from the date of this judgment, and the defendant shall recover from plaitniffs on its conunterclaim $408,063.32, together with interest at the rate of 9.15 percent per

annum from the date of this judgment. The parties shall pay their own taxable court costs.

IT IS FURTHER ORDERED that the issues of whether the interest of the defendant shoud be equitably subordinated to the interests of other creditors and the plaintiffs and the additional steps to be taken in the foreclosure of a mortgage and security interest relative to the defendant's counterclaim shall stand referred to the bankruptcy court upon this judgment's becoming final.

Dated May 31, 1989.

BY THE COURT

Warren K. Urbom /s/
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JOSEPH NELSON, et al.,

Plaintiffs,

v.

PRODUCTION CREDIT ASSOCIATION OF THE MIDLANDS,

Defendant.

CV88-L-238

VERDICT ON THE PLAINTIFFS' CLAIM

I. As to the plaintiffs' claim of negligence, we find:

√A. for the plaintiffs, Joseph and Margaret Nelson, and find they have incurred damages on that claim in the amount of $1,278,000.00*. This amount includes $None* that is also included in the palintiffs' claim of breach of contract and $372,275.00* in award of damages on the plaintiffs' claim of misrepresentation.

B. for the defendant, Production Credit Association of the Midlands.

II. As to the plaintiffs' claim of breach of contract, we find:

√A. for the plaintiffs, Joseph and Margaret Nelson, and find they have incurred damages on that claim in the amount of $1,278,000.00*. This amount includes $905,625.00* that is also included in an award of damages on the plaintiffs' claim of negligence and $372,375.00* that is also included in an award of damages on the plaitiffs' claim of misrepresentation.

B. for the defendant, Production Credit Association of the Midlands.

III. As to the plaintiffs' claim of misrepresentation, we find:

√A. for the plaintiffs, Joseph and Margaret Nelson, and find they have incurred damgages on that claim in the amount of $1,278,000.00*. This amount includes $None* that is also included in an award of damages on the plaintiffs' cliam of breach of contract and $905,625.00 that is also included in an award of damages on the plaintiffs' claim of negligence.

B. for the defendant, Production Credit Association of the Midlands.

Dated May 26, 1989.

Wilford Leach /s/
Foreperson

* Amounts were filled in as per person.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JOSEPH NELSON, et al.,

Plaintiffs,

v.

PRODUCTION CREDIT ASSOCIATION OF THE MIDLANDS,

Defendant.

CV88-L-238

VERDICT ON THE DEFENDANT'S COUNTERCLAIM

As to the counter claim of the defendant, PCA, we, the jury find:

√A. for the defendant, Production Credit Association of the Midlands, in the amount of $408,063.32*.

B. for the plaintiffs, Joseph and Margaret Nelson.

Dated May 26, 1989.

Wilford Leach /s/
Foreperson

* Amounts were filled in as per person.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JOSEPH NELSON, et al.,

Plaintiffs,

v.

PRODUCTION CREDIT ASSOCIATION OF THE MIDLANDS,

Defendant.

CV88-L-238

MEMORANDUM AND ORDER ON POST-TRIAL MOTIONS

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

A Rule 50(b) motion for judgment notwithstanding the verdict may be granted upon the same grounds and standard as a motion for a directed verdict. That standard is stated in Savage v. Christian Hospital Northwest, 543 F.2d 44 (8th Cir. 1976) as follows:

> "Under ... federal ... law '(a) verdict may be properly directed only when the evidence is such that, without weighing the credibility of witnesses, there can be but one reasonable conclusion as to the verdict.' Meitz v. Garrison, 413 F.2d 895, 896 (8th Cir. 1969). 'A directed

> verdict is in order only when the evidence points all one way and is susceptible of no reasonable inferences sustaining the position of the nonmoving party.' Giordano v. Lee, 434 F.2d 1227, 1231 (8th Cir. 1970), cert. denied, 403 U.S. 931, 91 S.Ct 2250, 29 L.Ed2d 709 (1971). 'In making this determination, the evidence, together with all reasonable inferences to be draw therefrom, must be viewed in the light most favorable to the nonmoving party.' Decker-Ruhl Ford v. Ford Motor Credit, 523 F.2d 833, 836 (8th Cir. 1975)."

I. Breach of Contract

The theory of breach of contract was submitted to the jury, the definition of the contract being:

> "PCA agreed to provide operating capital for the expansion of the Nelsons' ranch operation to full productivity over a three-year period and to restructure the Nelsons' debt situation to permit proper funding of the Nelsons' ranching operation ..."

The defendant asserts that, even if evidence were to support that definition of a contract, the terms were so indefinite as

to constitute no contract at all. In Davco Realty Co. v. Picnic Foods, Inc., 198 Neb. 193, 252 N.W.2d 142 (1977), the court said:

> "'[T]he subject matter of the agreement must be expressed in such terms that it can be ascertained with reasonable certainty,' 17 Am. Jur.2d, Contracts § 76, p. 416. 'Absolute certainty is not required, however, only reasonable certainty is necessary. A contract is not subject to the objection that it is indefinite so long as the parties can tell when it has been performed, and it is enough if, when that time arrives, there is in existence some standard by which performance can be tested' Id. at 417."

In Davco there was an agreement, as described by the court,

> "to mutually develop their respective properties for the benefit of both. Picnic agreed to do certain paving and granted Davco an easement across its property. In return Davco granted Picnic an easement across its property. Picnic thus would obtain ingress and egress to its property from West Dodge Road. Davco would obtain access to additional parking space enabling it to add on to the building on its property."

The district court in Davco found the agreement indefinite and uncertain in regard to the nature of the paving material to be used, the depth and thickness of the paving, the foundation work and site preparation work required, and the time within which Picnic was required to perform. The Supreme Court of Nebraska held that the provisions of the contract were sufficiently specific to permit enforcement, because under Nebraska law in a building and construction contract it is implied that the building will be erected in a reasonably good and workmanlike manner and will be reasonably fit for the intended purpose. That, coupled with the implied time of performance to be within a reasonable time under the circumstances, "cures any ambiguity otherwise inherent in the agreement." Id. p. 198.

Where the lending of money is involved, however, specificity is more important, because of the lack of implied terms that may be imposed. In Union State Bank v. Woell, 434 N.W.2d 712 (N.D. 1989) the claim was as follows:

> "Woell asserts that he and the Bank entered into an oral agreement that required the Bank 'to continue loaning money to Woell up to the extent of the Bank's lending limit and then to put Woell into contact with other lending sources beyond this Bank's lending limit."

The court held that there was no enforceable agreement as a matter of law. The court said:

> "Woell has pointed to nothing in the record that would support even a reasonable inference that the Bank agreed to lend him in the future a specific amount of money over a specified period at a specified interest to be repaid under specified terms. There is no allegation that the parties agreed upon any of these specific items. While the Bank did loan Woell some funds, Woell has not demonstrated how these loans tell us the total amount of monies to be loaned nor does it provide us

> with any index to determine how the parties intend the alleged continuing financing to be arranged. ... We therefore conclude that, as a matter of law, the alleged oral contract to provide future financing for Woell's business fails for lack of certainty of the contract's terms. ..."

Id. at 717.

Similarly, in Labor Discount Center v. State Bank & Trust Company, 526 S.W. 407, 425 (Mo. App. 1975) the court held that a claimed oral agreement to continue interim financing was not sufficiently definite as to be enforceable where the due date, security, rate of interest and the time for repayment were not specified.

In Neujahr v. Producers Commission Association, 838 F.2d 1003 (8th Cir. 1988), a claimed contract was held to be insufficiently definite to take it out of the realm of the statute of frauds when the writing did not state the salary at which the plaintiff was to be employed, or the

various kinds of insurance the plaintiff claims he was promised. The court said that provisions of this kind "are essential elements of the alleged oral contract." Id. at 1004.

In the case at bar the evidence that must be relied upon as proving a contract is essentially the testimony of Joseph Nelson. Beginning in about 1975 Joseph and Margaret Nelson for several years borrowed on a yearly basis from the Production Credit Association of the Midlands (PCA) for their short-term borrowing on a ranch operation. Loan papers designated yearly loans as due in one year and indicated the specific security involved. When the Nelsons needed more money, they would make application to PCA for "additionals." By August 1983, the operation had shown a loss for three consecutive years and the balance to become due at the end of 1983 was

approximately $750,000. PCA expressed concern about the loan's liquid margin and the "historical loss trend." Exhibit 657.

Joseph Nelsons' testimony continued:

"Q. ... Were you and your wife in the fall of 1983 looking for money to pay down the PCA?

A. Yes, we were.

Q. And why were you doing that?

A. Because it was a request by Rod Uhrig from the PCA that we obtain four to $500,000 to put in as a pay down to the PCA.

Q. Did Mr. Uhrig in addition to requesting that pay down also request something else of you?

A. He requested a plan plus the four to $500,000.

Q. So this plan is the, was on of the responses to that request?

A. Yes it was."

The Nelsons then developed a "ranch plan" (Exhibit 65) with the help of Dr. Pat Reece and Jim Robb that contemplated

completely stocking the ranch with feeder cattle to utilize the resources. Joseph Nelson testified that the Nelsons discussed the ranch plan with Wayne Goff, the president of the PCA, on November 3, 1983, at which Mr. Nelson told Mr. Goff of the plan and said, "we must fill up the pastures with calves, and we've got to fill the ranch completely" to which Goff replied, "we certainly need to do something and that sounds like it's probably a pretty good idea." Then in response to the question, "Did he tell you then that he would loan you money to fund the ranch plan?" Nelson testified: "Well, he said we can't do anything at this time until we get money put in here. We were shut off at that time, and he would not do anything until we come up with the money. They wanted to pay down to four to five hundred thousand dollars."

Nelson testified that Goff suggested that the Nelsons go to the Federal Land Bank for pay down money. Nelson testified that they went to the Federal Land Bank and applied for a loan of little over $500,000.00, but the loan was denied. They then went to Travelers Insurance Company and received a commitment to loan the Nelsons $350,000.00. They then relayed that fact to Goff and asked whether that would "be enough to make the plan work. And he said that would be fine."

Joseph Nelson testified that in February 1984, he talked with Tom Willnerd, telling Willnerd about the "ranch plan" and said that "we had to fill up the ranch with cattle, stock it completely." Nelson told Willnerd that Nelson and Skip Marland of Travelers Insurance Company had met with Dr. Pat Reece about the ranch plan. At that time the Nelsons had two delinquent

notes with the Federal Land Bank--one on the ranch and one on the farm. Nelson asked Willnerd for money to pay those loans, "but until there was a definite commitment by Travelers we were--there was no funds available." Willnerd said the ranch plan "was a good idea because there had to be a definite plan here in the works in order for them to do this." Willnerd said, "we had to have Travelers' money in there to be able to do this, have a definite commitment from Travelers before there would be any funds."

"This," as referred to in the foregoing conversation with Willnerd, was not identified in the testimony of Nelson any more specifically and the only reference it reasonably can be said to have is the request for money to pay the delinquent loans on the ranch and farm.

With respect to funding the ranch plan, Nelson testified:

"Q. Did Mr. Willnerd say that the amount of money coming from Travelers would not be enough for the PCA to fund your plan?

A. No, he did not.

Q. Did Mr. Willnerd make any comments about the inadequacy of the amount of money you were borrowing from Travelers?

A. No, he did not.

***

Q. And was there any discussion about the--first of all, what was the term of the Travelers' loan?

A. The term of the Travelers' loan was for three years and this was brought up that we had to have three years on this plan to implement this plan.

***

A. Yes, it was discussed that--at the meeting there that we had to have at least three years, that Skip Marland made it quite clear to Tom Willnerd at the time he said whatever we do the ranch plan's going to take three years, my loan is for three years.

***

Q. ... Mr. Nelson, after that did Mr. Willnerd tell you any reason why the PCA couldn't go with you for three years?

A. No, he did not.

Q. Did Mr. Willnerd say that the PCA would not go with you for three years?

A. No, he did not.

***

Q. ... Mr. Nelson, was anything else discussed at this meeting?

A. Not that I recall."

The next meeting with Mr. Willnerd was on February 24, 1984, when Exhibit 704, an application for a loan of $677,823.05 was made. Willnerd prepared the document and Nelson signed it, which contemplated the purchase of 425 calves. Nelson's testimony continued:

"Q. ... Mr. Nelson, without telling us what your cattle buyer said, just explain why you signed this document for the purchase of 425 head.

A. Well, we needed--we had so much grass available there, and until we got the funds from the Travelers, they didn't want to turn loose of very much, and I could take in a thousand head at that time and it was getting late to buy this many calves that were out in the spring here, and I could take in another thousand to run with these, and so thats what I did and then we agreed, Tom said that if we could do this for now--

***

Q. ... Okay. So there was--was there discussion, Mr. Nelson, about the timing of the time of the year that these cattle were being purchased?

A. Yes, there was.

Q. And what did you tell Mr. Willnerd?

***

THE WITNESS: That it was getting late in the spring and it was going to be hard to find this many good calves that hadn't been warmed up at this time of the year, and that I could

take in a thousand and so we agreed that by taking in these thousand--

Q. ... I just want you to tell me, Mr. Nelson, what you told Mr. Willnerd.

A. That we could take these other thousand in for now then.

Q. What did Mr. Willnerd say to you?

A. He said he thought--

***

THE WITNESS: He said that he agreed with that, this would be a good idea and we could start buying calves early next fall to fill it up then."

Thereafter, Joseph Nelson testified, he applied for a loan from Travelers. Travelers required a letter of credit in the amount of $17,500.00 from PCA and Nelson went to Wayne Goff for that letter. Goff said that he would send such a letter.

Nelson's testimony continued:

"Q. Was there anything else said at this meeting?

A. Unless this was the time that I asked him if the $350,000 was going to be enough to make the ranch plan work, and he says that would be fine.

***

A. He said that--I asked him if $350,000 was going to be enough, they wanted four hundred to five hundred thousand, and I says is that going to be enough to make this plan work, and he says that would be fine.

Q. Was there anything else said?

A. Not that I recall."

The next meeting was in November 1984, with Willnerd. At that meeting Exhibit 718, an application for loan from PCA was filled out on November 14. Travelers' money had come in on July 31, 1984, and $96,000.00 of that was used to pay off the Federal Land Bank, the balance going to the PCA. Nelson said that before he filled out the application for the loan, Exhibit 717, in the amount of $453,391.24 Willnerd did

not tell Nelson anything about any discussions that he had had with other loan officers about the loan or any discussions that we had had with the board of directors about the loan. The application, Exhibit 717, anticipated the purchase of 625 feeder calves. Nelson said that he had signed that document:

"A. Because Tom Willnerd said--told him we needed to purchase a thousand and he said well, let's do the 625 for now, and I'll get you another four hundred. I'll go to the loan committee and get you another four hundred.

Q. ... Did you tell Mr. Willnerd--did you express to him the importance of filling up your ranch?

A. Yes, I did I said we've got to fill it to utilize the resources, to up the production, up the profit.

Q. Did he disagree with that?

A. No, he said he certainly knew that we had--we'd be understocked, it looked like, and that we needed to

do something, and he would take this to the loan committee, wanted us to sign this and he would take the-- he would go to the loan committee and get another four hundred.

***

Q. And at this--at this meeting when you're signing this document did Mr. Willnerd tell you that you would have to sign a memorandum of understanding?

A. Yes, after I had signed everything--

Q. Just at this meeting?

A. I'm sorry, yes, he did. In November, yes.

***

A. I had signed all these things, and he said he was sorry, he forgot to have me sign something. I said what was that, and he said just a minute, I'll be right back. About five minutes, ten minutes he come back and I said what's this, and he said well, it's a memorandum of understanding, and I was surprised and I said what does it say, and he says well, so he handed it to me and let me read it, he says Mr. Goff says that this goes

with the loan, they wanted it for their files. It was after I'd signed all this other stuff.

Q. Was your wife present?

A. Yes, she was.

Q. Did Mr. Willnerd explain anything further about the memorandum of understanding to you?

A. Well, he went through it with us and he said that if we didn't make the $29,725, I think it was, that we had to find a different lender. Well--

Q. On that point, Mr. Nelson, what did Mr. Willnerd say about the $29,000?

A. Well, my wife asked him if we could make that much money and he said it would be easy with this plan that you have.

Q. Did you sign it right away?

A. No, we left the office and drove out around and discussed it.

Q. Now, Mr. Nelson, would you please turn to Exhibit 60 in your book? Is that the memorandum of understanding?

A. Yes, it is.

***

A. We drove out, I was--I didn't know, I couldn't understand why they wanted this, and neither--I said we've got to have some time to think about this a little bit, Tom. So we drove, we left the office and drove around and we came--we read it and we thought we could do what it said, so we came back and signed it.

Q. Was there any discussions with Mr. Willnerd after you came back?

A. No, not really. We just signed it and--

Q. Then what happened?

A. We left the office.

Q. Now, during this meeting with Mr. Willnerd, at any time did Mr. Willnerd tell you that the PCA was not going to go along with your ranch plan?

A. No, he did not.

***

Q. Did you go out then and start buying cattle?

A. No, we didn't.

Q. Why not.

A. There was no funds to start buying these cattle. They had to take it to the loan committee.

Q. Okay. After this meeting in November, in December did you want to buy some cattle?

A. Yes, definitely.

Q. Did you call Mr. Willnerd to tell him that?

A. Yes.

Q. What did he say?

A. He said I had to take it to the loan committee."

Giving the foregoing the construction most favorable to the Nelsons, it does not support a conclusion that PCA agreed to provide operating capital for the expansion of the Nelsons' ranch operation to full productivity over a three-year period or to restructure the Nelsons' debt situation to permit proper funding of the Nelsons' ranching operation.

Furthermore, it is undisputed that Willnerd did not have the authority to

commit PCA to such an agreement and each of the loans about which Joseph Nelson talked with Willnerd and which were consummated in writing were one-year loans approved by the loan committee and not by Willnerd alone. Nothing said by Wayne Goff could be construed reasonably as a commitment by PCA to provide operating capital for a full productivity of the ranch over a three-year period or to restructure the debt.

Stretching the evidence to the point of construing some kind of a three-year agreement would still leave the terms of such an agreement too indefinite to permit the enforcement of the contract. There was no evidence of anything the Nelsons agreed to do, other than an agreement to sell a farm at the highest price per acre as quickly as possible. There was no evidence of the total amount to be loaned, or the amount to be loaned in any one year (except

the two written agreements, Exhibits 704 and 717, which are complete contracts in themselves and there is no claim that either of these was breached), or how repayment was to be made, or the interest rate to be charged, or when repayments were to be commenced or ended or the nature of the security. There was no course of dealing between the parties that could supply by inference any of these terms, because always the agreements in the past had been on a year-to-year basis with the repayment terms and interest rates fixed by agreement each year.

I conclude that the evidence did not support the finding of a contract to provide operating capital for the expansion of the Nelsons' ranch operation to full productivity over a three-year period or to restructure the Nelsons' debt situation to permit proper funding of the Nelsons'

ranching operation. Furthermore, I find that the terms of the contract, if a contract could be found, were not reasonably certain and, therefore, there could be no recovery for a breach. See Restatement of the Law Second, Contracts 2d, § 33.

Accordingly, the motion for judgment notwithstanding the verdict must be granted as to the breach of contract claim.

II. Misrepresentation

The defendant asserts that the instruction to the jury on misrepresentation was prejudicially erroneous because it required "that the representation was made fraudulently." The defendant says that the plaintiffs' claim for fraudulent misrepresentation was dismissed and the only remaining claim was one for negligent misrepresentation, which does not require that the plaintiffs prove

that the representation as made fraudulently. The exact status of Nebraska's law with respect to misrepresentation is somewhat murky, but I submitted the issue of misrepresentation under the heading "MISREPRESENTATION," not under either the heading "FRAUDULENT MISREPRESENTATION" or "NEGLIGENT MISREPRESENTATION." It was submitted in terms of burden of proof most favorable to the defendant, because it required the plaintiff to prove that the representation was made fraudulently. Even if the law of Nebraska is that there is no requirement that representation be made fraudulently, it was no prejudice to the defendant to have that additional requirement included as a plaintiffs' burden. While I do not have a transcript of the objections made to the instructions, I am confident that the defendant did not object to the inclusion

of the requirement that the representation be fraudulent, although it is likely that the defendant objected to the submission to the jury in any fashion the issue of misrepresentation.

Additionally, the defendant argues that the six alleged misrepresentations submitted to the jury should not have been submitted because of a lack of evidence.

The first matter submitted to the jury was:

> "the intention of PCA to provide financing for the Nelsons' ranching operations in accordance with the ranch plan in the 1984, 1985, and 1986 operating years."

A careful review of the evidence on this subject persuades me that there was insufficient support for that claimed misrepresentation to permit it to be submitted to the jury. The testimony of Joseph Nelson, the strongest testimony there was regarding any representations by

any of the PCA personnel, is set out at some length in the section of this memorandum relating to claim of breach of contract. A review of it shows that there simply was no evidence that PCA represented that it intended to provide financing for the Nelsons' ranching operations in accordance with the ranch plan in the 1984, 1985, or 1986 operating years.

The second claimed misrepresentation was:

> "that the PCA had a special concern for its members beyond that of a regular commercial bank and that the PCA would conduct its business according to this special concern."

There was testimony at the trial that PCA differed from a commercial bank in that it was involved only in agricultural lending and that it considered its borrowers to be members. I have already ruled that there was no fiduciary duty owed by the PCA to the Nelsons and the

plaintiffs have submitted me nothing to persuade me otherwise. The evidence does not support a claim that any such representation was false or that the representation was made fraudulently or that the Nelsons relied upon it or that there was any damage from it.

The third claimed misrepresentation was:

> "the terms and conditions of the relationship between the parties after the Fall of 1983."

This broad, undefined claim is so indefinite as to have no substance. The plaintiffs' briefs in resistance of the present motions and their trial brief do not appear to deal with the specifics that are claimed to inhere in this general claim. I simply cannot tell what terms and conditions are supposed to have been misrepresented. If they have to do with a claimed agreement to fund the Nelsons'

operation over a three-year period in accordance with the ranch plan, I already have concluded that there is insufficient evidence to support any claim that there was such an agreement. I do not know what other "terms and conditions" this claim represents. Accordingly, it should not have been submitted to the jury.

The fourth claimed misrepresentation was:

> "that the reasons for the PCA's requirement of cash pay down of the Nelsons' loan with the PCA was to make the PCA's loan a sound loan for PCA and the Nelsons."

The requirement of a cash pay down of the loan was first made, apparently by Rodney Uhrig. By letter dated August 19, 1983, he expressed concern about Nelsons' declining financial position, the loan's workability, and the Nelsons' repayment capacity. He said there were several options available, including sale of

livestock and real estate, but said that "the fact remains that your financial position requires substantial debt reduction (more than sale of the cowherd alone can achieve) as well as a reduction in overall operating costs if the loan is to return to a workable cashflow position. ..." After a meeting between Joseph Nelson and Uhrig, Uhrig wrote Nelson:

> "In order for the PCA to finance a program similar to that which you followed in the past year, a livestock margin position of $200,000 would need to be provided. To achieve this, additional long-term financing of $400,000-$500,00 would have to be obtained to retire the estimated PCA carryover debt, plus purchase of 600 head of calves. From our standpoint, the $400,000 figure is a minimum, since the loan's liquid margin could deteriorate swiftly if your historical loss trend continues.
>
> Finally, I should stress the point which I made earlier, that if you choose to pursue the refinancing route, you should make every effort to obtain the maximum loan possible, since our position will rely almost

> entirely upon a liquid margin with secondary collateral of machinery and a third mortgage with limited equity. ..."

Exhibit 657.

Nelsons tried to get a loan of $542,000.00 from Federal Land Bank, but the bank refused to make the loan. Nelsons then went elsewhere, but the best loan they were able to make was with Travelers Insurance Company in the amount of $350,000.00, of which about $250,000.00 went to PCA for the pay down. In reviewing the evidence I simply find nothing to suggest that there was any misrepresentation involved as to the reasons for the requirement of a pay down. The only reason stated, as far as I can tell, were to enable PCA to renew the loan. That did not involve a misrepresentation.

The fifth claim of misrepresentation was:

> "that the $350,000.00 loan from Travelers would pay down the PCA and permit the PCA to fully fund

> the Nelsons' cattle operation to a maximum production level as provided by the ranch plan."

As analyzed elsewhere, there was neither an agreement nor a representation that PCA intended to or agreed to fully fund the Nelsons' cattle operation to a maximum production level as provided by the ranch plan.

The sixth claimed misrepresentation was:

> "by telling Travelers and the Nelsons that PCA intended to go along, in good faith, as the Nelsons' operating lender for a three-year period so that the Nelsons could implement their ranch plan and work their way out of debt."

The evidence does not support the claim that PCA ever told that to the Travelers or to the Nelsons.

It follows that the motion for judgment notwithstanding the verdict with respect to the claim of misrepresentation must be granted.

III. Negligence

In the plaintiffs' trial brief the plaintiff says:

> "While courts have generally not found a cause of action for negligent lending of money, there is a trend which finds that a bank or other lender can be liable when there is a special nexis [sic] between the life lender and the borrower."

Plaintiffs' Trial Brief, p. 73. They cite only Jacques v. First National Bank, 515 A.2d 756 (Md. 1986), and Djowharzadeh v. City National Bank and Trust Co., 646 P.2d 616 (Okl. App. 1982). In the latter case the court held that summary judgment was inapplicable where a bank customer alleged that a loan officer wrongfully disclosed confidential financial investment information to the bank president's wife and the wife of the chairman of the board of directors, who then bought the investment property for their own account, causing the customer to lose a valuable

real estate investment opportunity. The court held that there is a duty on the part of the bank of confidentiality owed to the customer not to reveal purposes for which the customer expects to invest the loan, if made.

The sole case in the plaintiffs' briefs that involves a holding that a lender has a tort duty to use reasonable care in the making of a loan is Jacques v. First National Bank, 307 Md. 527, 515 A.2d 756 (1986). There a customer sought a loan to buy a residence. The bank agreed, for a $144.00 appraisal fee, to process the application and to hold the interest rate at 11 7/8 percent for 90 days.

On a negligence theory the jury in Jacques awarded $10,000.00.

In upholding the jury award the appellate court analyzed the case as follows: Since the harm likely to flow

from a failure to process a loan application carefully is an economic one, the relationship that needs to exist between the parties as a prerequisite for imposing a tort duty must be closer than if the harm were for physical injury. Generally no tort duty will be found absent a showing of privity or its equivalent, where the risk of harm is economic loss. Here there was a contract--to process the application and to hold the interest rate at 11 7/8 percent for 90 days. Valid consideration was given--the $144.00. Implicit in that contract is the agreement to perform with reasonable care. In dealing with the question of whether a tort duty should be recognized under those circumstances, the court said that the bank took on a significant obligation in agreeing to process the application, because the bank knew that Jacques had

agreed either to proceed with the settlement of the purchase or forfeit a $10,000.00 deposit and lose the benefit of their bargain. In view of the dramatic increase in the prime rate of interest while the loan was being processed and the short time the Jacques were given by the contract to try for alternative financing (51 days), the court considered it doubtful that the Jacques had the ability to get alternative financing.

The Maryland court also spoke of the public nature of the banking business and noted that:

> "The law generally recognizes a tort duty of due care arising from contractual dealings with professionals such as physicians, attorneys, architects, and public accountants. Additionally, we have recognized that in those occupations requiring peculiar skill, a tort duty to act with reasonable care will be imposed on those who hold themselves out as possessing the requisite skill."

Accordingly, the Maryland court held that a tort duty was placed upon the bank in the circumstances of that case.

The court rejected the argument that lending is an art, rather than a science, and that a difference of opinion might be present among persons making such loans. The same, the court said, could be said of physicians, yet a tort duty is imposed upon physicians. It also says that evidence of the practice of many banks of the defendant bank established the standard.

In the case at bar the plaintiffs' brief in opposition to the defendant's motion for judgment notwithstanding the verdict and new trial cites at page 4 Federal Land Bank of Omaha v. Gibbs, 809 F.2d 493 (8th Cir. 1987) for the proposition that institutions of the Farm Credit System are subject to common law

theories "such as negligence, contract, fraud, etc." But the Gibbs case stands for nothing as broad as that. What is says at page 496 is:

> "Buried under the meritless RICO, section 1983, and antitrust claims, the one contention of the Gibbs that has merit, if their allegations are correct, is that the P.C.A. reneged on its agreement to provide them with funds to make the FLB payment, to buy cattle, and to keep their farm operating."

but says nothing at all about a common law duty to use due care.

The plaintiffs argue that there was a fiduciary relationship between the Nelsons and the PCA, but I previously have held that such was not the case and I am persuaded that I was correct. Nothing that I have been able to find or that counsel have been able to show me suggests that under Nebraska law there was such a fiduciary relationship. Furthermore, no case in Nebraska has held or even hinted

that a lender has a tort duty to use reasonable care in the making of a loan. I conclude that if the issue were presented to the Supreme Court of Nebraska it would decline to impose upon a lender such a duty.

Even if the Nebraska Supreme Court were to adopt the same reasoning as was used by the Maryland court in the Jacques case, that would not reach the present case. In Jacques the bank and the customers had a specific contract, buttressed by consideration. In the present case there was no evidence of a contract to do anything with respect to the Nelsons. Even if there were evidence to support the plaintiffs' theory of an agreement by the PCA to provide operating capital for the expansion of the Nelsons' ranch operation to full productivity over a three-year period and to restructure the

Nelsons' debt situation to permit proper funding of the Nelsons' ranching operation, that claim was sued under the breach of contract theory and cannot form a separate claim in negligence. Nothing in Jacques nor in Nebraska law suggests that both a contract action and a negligence action are permitted when duties rest upon a contract. When a claim is based upon a failure to comply with an express contractual provision, the nature of the action is in contract rather than in negligence. See L. J. Vontz Construction Co. v. State of Nebraska, 230 Neb. 377, _____ N.W. _____ (1988); Fuchs v. Parsons Construction Co., 166 Neb. 188, 88 N.W.2d 648 (1958).

In Labor Discount Center, Inc. v. State Bank & Trust Company of Wellston, 526 S.W.2d 407 (Mo. App. 1975) the court said:

> "The finding of the trial court that plaintiff failed to prove a contract of sufficiently definite terms to admit of enforcement is, in our opinion, well-founded.

> The amount of the alleged promise for additional interim financing was the subject of inconsistent testimony by some of plaintiffs' own witnesses, although one might conclude that the most likely figure was $500,000. There was not, however, any evidence as to due date, security, rate of interest, time for payment, etc. Taken alone, the absence of any one of these terms might not be of great significance; viewed collectively, however, their absence is fatal and he alleged promise was correctly found by the trial court to be too indefinite to admit of enforcement. John Deere Company of St. Louis v. Short, 378 S.W.2d 496, 503 (Mo. 1964); Restatement, Contracts § 32 (1932)."

In John Deere Company of St. Louis v. Short, supra, the court said:

> "... Nor was John Deere under any contractual obligation to grant cash loans or equipment loans to Short, either by the provisions of the three written contracts entered into by the parties, or as a result of I. L. Parks' gratuitous promise that John Deere would make a loan to Short. Short contents [sic] that I. L. Parks' statements that the company would make short a loan resulted in a contractual obligation on the part of John Deere to make a loan, but such a promise would be unenforceable for uncertainty if for no other

> reason, since there was nothing said about the terms of the prospective loan--what amount, when the loan was to be made (except the vague reference to 'in the spring'), the due date for repayment, security, etc. More importantly, Parks had no authority to make such a commitment on behalf of John Deere. Under the evidence the only person in the John Deere organization who had that authority was the vice-president and general manager. Nor do we find any basis for an estoppel to deny Parks' authority, as claimed.

The defendant has asked that the issues regarding negligence be certified to the Supreme Court of Nebraska. The plaintiffs, against whom I now find on the issues, have asked that I not certify those issues and I shall not do so.

There was, of course, evidence throughout the trial of agreements between the parties consisting of loans and promises to repay. Those are not the loans that are at issue here, except in the counterclaim. No duty to make new loans or

to extend loans already made arose from previous loans made by the defendant to the plaintiffs.

MOTION FOR NEW TRIAL

Rule 50(c) of the Federal Rules of Civil Procedure provides:

> "(1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the

judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than ten days after entry of the judgment notwithstanding the verdict."

The standard for review on a motion for new trial is set out in Wyatt v. Interstate & Ocean Transport Co., 623 F.2d 888 (8th Cir. 1980):

> "The motion for a new trial on the merits, however, requires a review of the evidence under a different standard. Under Rule 59, F.R.Civ.P., a trial court may weigh the evidence and consider the credibility of the witnesses. Indeed, a trial judge has a duty to set aside a verdict and grant a new trial even though it is supported by substantial evidence, 'if he is of the opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false or will result in a miscarriage of

justice ...' Williams v. Nichols, 266 F.2d 389, 392 (4th Cir. 1959), citing, Aetna Casualty & Surety Company v. Yeatts, 122 F.2d 350 (4th Cir. 1941)."

I. Breach of Contract

If it later is determined that the judgment notwithstanding the verdict was improperly awarded the defendant and it is concluded that there was a contract in which PCA agreed to provide operating capital for the expansion of the Nelsons' ranch operation to full productivity over a three-year period and to restructure the Nelsons' debt situation to permit proper funding of the Nelsons' ranching operation, I need to resolve the question of whether the issues presented to the jury were properly presented.

The first submission was that the jury might find a breach by PCA "by unreasonably calling the Nelsons' loan and failing to look at the possibility of the Nelsons' ability to work out their debt situation by

following the ranch plan." There was adequate evidence of the PCA's unreasonably calling the Nelsons' loan. There was not evidence, however, that PCA "failed to look at the possibility of the Nelsons' ability to work out their debt situation by following the ranch plan." PCA did look at the possibility. It did not accept the ranch plan, but that is quite different from looking at the "possibility." Thus as to that submission, I would grant a new trial.

The second submission was of a breach "by failing to assist the Nelsons in development of a viable ranch plan." If PCA agreed to follow the ranch plan, then there was evidence that it failed to follow it and thereby failed to assist the Nelsons in the development of a viable ranch plan.

The third submission was of a breach "by only looking after the PCA's own

interests and not to any interest of the Nelsons." There was evidence that PCA looked after its own interests only.

The next submission was of a breach by "sclacking off of agreements and understandings that had been entered into by the parties." Again, if there was sufficient evidence of a contract to fund the ranch plan for three years, there was evidence of a slacking off of that agreement.

The next submission was of a breach "by offering substandard performance in agricultural credit analysis and advice and thereby increasing the risk of potential default of the Nelsons." That submission was properly submitted to the jury, if there was a contract to provide operating capital for the expansion of the Nelsons' ranch operation to full productivity over a three-year period.

The last submission was of a breach "by unnecessarily increasing the risk of nonpayment by the Nelsons." There was evidence to support that claim, if a contract existed.

The defendant argues that the evidence regarding damages was insufficient, but I am not inclined to think so. There was, however, strong evidence in opposition to the testimony of the plaintiffs' expert, Ellsworth Bartlett, but all things considered, the jury had before it sufficient information from which to make a judgment about damages. Thus, I conclude that the only ground for granting of a new trial on the breach of contract claim was the failure of evidence to support the allegation that PCA failed to look at the "possibility" of the Nelsons' ability to work out their debt situation by following the ranch plan. But on that ground, a new trial would need to be ordered.

II. Misrepresentation

My earlier analysis regarding the specific issues of misrepresentation indicates that none of the six submissions was supported by the evidence. Even if one, but less than all, of the submissions was supported by the evidence, the fact that the remainder were not would require the granting of a new trial on the misrepresentation claim.

III. Negligence

If it later be determined that under Nebraska law a negligence claim was possible, I am then obligated to determine whether there was sufficient evidence on each of the issues of negligence presented to the jury.

The first was negligence "by failing to follow the recommendations of the ranch plan in any lending after the Fall of 1983." There was evidence to support that claim.

The second claim of negligence was "by failing to take into consideration the desires of the Nelsons to work out their debt with the PCA." I do not find any evidence to support that issue. The evidence seems to me to have been that PCA did take into consideration the desire of the Nelsons to work out their debt, but not in the same manner that the Nelsons' desired. I do not find in the plaintiffs' expert's testimony that the standard of care in the industry required a yielding to the Nelsons' desire as completely as the stated submission would require.

The third claim of negligence was "by failing to consider all sources of information, including the ranch plan, the people who wrote the plan, the information available from the Extension Service, range management data from the University of Nebraska, and marketing techniques

information from the University of Nebraska and the Farm Credit System." I think there was insufficient evidence to submit that issue to the jury. There was no evidence that PCA did not consider the ranch plan, but other persons in PCA who were the loan officers did discuss it and consider it, although not with a deference that it may have deserved.

The fourth submission was negligence "by failing to administer the plaintiffs' loan applications and loan renewals in accordance with the accepted practice of loan administration for PCA and agricultural lenders in Nebraska." The plaintiffs' expert Norman L. Peterson, supported that claim.

Next was a submission of negligence "by failing to comprehend the notion that the problem in the Nelsons' operation was

not in the expense side, but on the income side." This, also, was supported by Mr. Peterson's testimony.

The next submission was negligence "by failing to analyze and understand the Nelsons' credit needs when PCA required a pay down of its loan. I do not find in Mr. Peterson's testimony or otherwise an indication that the defendant owed to the plaintiffs any duty as broad as is implied by that submission. PCA did not fail to analyze or understand the credit needs. It may not have provided for those needs, but it was not because of a failure to analyze or understand. That submission should not have been presented to the jury.

Next, was a claim that there was negligence "by failing to realize that the only way the Nelsons could pay off PCA from operations was through an increase in the number of cattle up to full utilization

under an intensive range management program. This is a close question, but I am inclined to think that the evidence was sufficient to support that claim.

Next, was a claim of negligence "by failing to provide the Nelsons with sound loan advice in 1983 and 1984 when PCA told the Nelsons that pay down of their debt would increase the Nelsons' repayment capacity and that the 1984 operating money and additionals were enough for the Nelsons to make a profit." Again, the testimony supported that claim.

The last submission was of negligence "by not making a sound loan after the Travelers' commitment in the Spring of 1984." If there was a contract to make a loan permitting full utilization of the ranch, then the evidence supported the claim that there was not sound loan made in the Spring of 1984.

Accordingly, I find that, within the provisions of Rule 50(c) of the Federal Rules of Civil Procedure, there needs to be a conditional granting of the motion for new trial.

IT THEREFORE IS ORDERED that the motion for judgment notwithstanding the verdict, filing 249, is granted and the motion for new trial, filing 249, is granted if the judgment entered as a result of the granting of the present motion for judgment notwithstanding the verdict is vacated or reversed.

IT IS FURTHER ORDERED that the motion to stay proceedings to post bond and motion to establish supersedeas bond pending disposition of defendant's post-trial motions, filing 258, are denied as moot; and the defendant's motion to certify questions of law to the Nebraska Supreme Court, filing 262, is denied.

Dated August 25, 1989.

BY THE COURT

Warren K. Urbom /s/
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 89-2554

Joe Nelson and Margaret Nelson,	*	Appeal from the United States District Court for the District of Nebraska
Appellants,	*	
v.	*	
Production Credit Association of the Midlands,	*	
Appellee.	*	

Submitted: June 13, 1990

Filed: April 9, 1991

Before JOHN R. GIBSON, Circuit Judge HEANEY and TIMBERS,* Senior Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

Joe and Margaret Nelson appeal from an order granting judgment notwithstanding the

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* The HONORABLE WILLIAM H. TIMBERS, Senior United States Circuit Judge for the Second Circuit, sitting by designation.

verdict in favor of Production Credit Association of the Midlands (PCA). The jury found in favor of the Nelsons on their claims of breach of contract, negligence and misrepresentation and awarded damages to the Nelsons in the amount of $1,278,000.00. The district court[1] subsequently entered a judgment notwithstanding the verdict for PCA on all three claims, and, in the alternative, granted the motion for a new trial.

On appeal, the Nelsons challenge the judgment notwithstanding the verdict by arguing that: (1) the district court should not have relied on North Dakota precedent when determining the validity of an oral contract formed in Nebraska; (2) sufficient evidence of misrepresentation existed to sustain the jury's verdict; and (3) the district court erred when it held that PCA had no duty to lend money to the

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1 The Honorable Warren K. Urbom, United States District Judge for the District of Nebraska.

Nelsons. Finally, Nelsons argue that the district court abused its discretion when it granted the provisional order for a new trial. We affirm the district court's entry of judgment notwithstanding the verdict and do not reach the issue of the ruling on the new trial motion.

Joe and Margaret Nelson were ranchers in Morrill County, Nebraska. They borrowed money each year to purchase cattle and pay their operating expenses. Each fall they sold cattle to repay the loans.

In 1975 the Nelsons changed lenders from a local bank to PCA, a cooperative organization. In November of each year, the Nelsons would present financial information to PCA and apply for a loan for the upcoming year. After reviewing the ranch's financial condition, the PCA would decide whether to lend.[2] In exchange for the loans, the Nelsons would give PCA a

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2 The PCA approved and loaned the Nelsons money every year in which they made a loan application.

lien on all ranch livestock, products, and machinery. In years when the ranch lost money, the Nelsons included the losses in the requested loan amount for the upcoming year, thus carrying the debt forward.

The Nelsons incurred losses in five of the seven years between 1977 and 1983. During that time PCA became concerned about the high expenses of the Nelson's farm and their mounting debt. In 1983, one of PCA's loan officers wrote to the Nelsons explaining that before PCA would consider the loan application for the 1984 operating year, the Nelsons would have to devise and implement a plan to reduce their outstanding debt with PCA.[3] PCA warned the

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3 The August 1983 letter from Rodney S. Uhrig to Joe Nelson contained the following excerpts:

> As I explained earlier this week, we are extremely concerned about your declining financial position, the loan's workability, and your repayment capacity. The increasing negative trend has placed the PCA in the position of presently relying upon real estate security for adequate

Nelsons: "Your financial position requires substantial debt reduction (more than sale of the cow herd alone can achieve) as well as reduction in overall operating costs if the loan is to return to a workable cashflow position."

PCA's request for a "plan" prompted the Nelsons to go to a management specialist and an economist at the University of Nebraska Panhandle Station for help. These experts devised a Ranch

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> margin in one loan. As a short-term lender, this position is unacceptable, as is the increasing risk associated with the loan.
>
> . . .
>
> In light of the foregoing, the association must advise you that we will require a definite plan to achieve the necessary debt reduction before consideration will be given to renewal of the loan this fall or financing for the upcoming year. We also will require a workable realistic quarterly cash flow within which you will be expected to operate.

Appendix for Appellee at 1-2, Nelson v. PCA, (8th Cir 1991) (No. 89-2554) (emphasis added).

Plan[4] for the Nelsons. The Ranch Plan analyzed the production potential of the Nelsons' ranch, and proposed additional stocking and intensive grazing techniques to increase the ranch's profitability.

Three weeks after the August letter, Rodney Uhrig of the PCA wrote a second letter to the Nelsons stating:

> Although I do not feel that refinancing your present debt is a solution to the problems that your operation faces, it seems that this alternative is the most appealing from your perspective. Therefore, unless we can agree upon a plan for dealing with those problems which is satisfactory to both of us, your alternatives are to either secure

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4 There is some disagreement between the parties whether this Ranch Plan was the "plan" which PCA called for in its August 1983 letter. Nelsons argue that PCA required the Ranch Plan before it would continue lending the money. PCA, on the other hand, argues that it called for a plan other than the Ranch Plan, a plan that would bring about a substantial reduction in Nelsons' short term debt. Accordingly to PCA, the primary feature of any such plan had to be that it reduced the Nelsons' short term debt to PCA. The Ranch Plan which Nelsons presented to PCA did not address debt reduction, but only examined the potential operating uses of the ranch property.

financing through another source or to provide the PCA with a sufficient liquid margin to offset the risk position of the loan. In the latter case, our credit decisions and future financing can only be based upon your ability to maintain this liquid position.

. . .

In order for the PCA to finance a program similar to that which you followed in the past year, a livestock margin position of $200,000 would need to be provided. To achieve this, additional long-term financing of $400,000-$500,000 would have to be obtained to retire the estimated PCA carryover debt, plus purchase of 600 head of calves. From our standpoint, the $400,000 figure is a minimum, since the loan's liquid margin could deteriorate swiftly if your historical loss trend continues.

Finally, I should stress the point which I made earlier, that if you choose to pursue the refinancing route, you should make every effort to obtain the maximum loan possible, since our position will rely almost entirely upon a liquid margin with secondary collateral of machinery and a third mortgage with limited equity. Considering this position, our ability to finance your operation under

> adversity would continue only so long as the liquid margin could be maintained.

Appendix for Appellee at 4-5 (emphasis added).

The PCA extended the 1983 loan past its November 1983 maturity to allow the Nelsons time to find a long-term lender and restructure their debt. Finally, in February 1984, when the Nelsons had obtained a long-term loan commitment from Traveler's Insurance Company, PCA renewed the 1983 loan until November 1984. Travelers loaned the Nelsons $350,000, of which the Nelsons paid approximately $240,000 to PCA.

During the 1984 operating year, the Nelson's ranch lost $61,000. As a condition to lending money to the Nelsons for 1985, PCA required the Nelsons to sign a memorandum of understanding which provided that if the ranch did not earn at least $29,725 in the 1985 operating year, the Nelsons agreed to find alternative

financing and pay off their PCA loan. After careful consideration, the Nelsons signed the agreement and received another one-year loan from PCA.

In 1985 the Nelsons lost $170,000, and by October of that year they owed PCA approximately $383,000. Since then they have not applied for a loan from PCA or made any payments on the 1985 loan. When PCA obtained an Order in Replevin, the Nelsons filed for protection under the Bankruptcy Code and an adversary proceeding ensued. The bankruptcy court ultimately transferred this case to the district court.

At trial, the Nelsons raised three primary claims. First, that their discussions with PCA of a Ranch Plan amounted to an oral contract in which PCA obligated itself to finance the Nelsons for a minimum of three years while they carried out the proposed plan. The Nelsons claimed six counts of breach of an oral contract,

primarily alleging that PCA unreasonably called the Nelsons' loan and did not adequately assist them in carrying out the Ranch Plan.

- Although the jury found the existence and breach of a contract, the district court's order granting PCA's motion relied on two grounds in concluding that no contract had been formed. First, it concluded that the relevant evidence, interpreted in the light "most favorable to the Nelsons, did not support a conclusion that PCA agreed to provide operating capital for the expansion of the Nelson's ranch operation to full productivity over a three-year period or to restructure the Nelsons' debt situation to permit proper funding of the Nelsons' ranching operation." Nelson v. Production Credit Association, CV88-L-238, slip op. at 10, (D. Neb, Aug. 25, 1989) The court also held that even if the evidence did point to some kind of agreement, the terms of such

an agreement were "too indefinite to permit the enforcement of the contract." Id.

The Nelsons' second claim was that PCA made six separate misrepresentations to them. These were: (1) that PCA intended to fund the Ranch Plan, (2) that PCA had special concern for its members beyond just acting as their commercial bank, (3) that the relationship between PCA and the Nelsons was more than just commercial lender and borrower, (4) that Nelsons were required to pay down their loan with PCA in order to make their ongoing loan relationship sound for both parties, (5) that getting $350,000 from Travelers and paying down the PCA loan would permit PCA to fund Nelsons' ranch plan, and that (6) PCA intended to act as the ranch's operating lender for at least three years so that the Nelsons could implement the ranch plan and work themselves out of debt.

The district court thoroughly considered the Nelsons' six claims of

misrepresentation and concluded that the strongest testimony presented at trial, viewed in the light most favorable to the Nelsons, did not support an actionable misrepresentation claim, and, therefore the misrepresentation claim should not have been submitted to the jury. Id. at 11-14.

The Nelsons' third claim was that PCA negligently failed to support the Nelsons' efforts to carry out the ranch plan. In their complaint, the Nelsons enumerated nine separate grounds for this negligence. Judge Urbom reviewed Nebraska tort law and concluded that PCA owed no fiduciary or common law duty to the Nelsons and that there could be no duty because no contract existed between the Nelsons and PCA.

The court also stated that even if evidence existed to support a contract to lend the Nelsons money, "that claim was sued under the breach of contract theory and cannot form a separate claim in negligence. Nothing in . . . Nebraska law

suggests that both a contract action and a negligence action are permitted when duties rest upon a contract. When a claim is based upon a failure to comply with an express contractual provision, the nature of the action is in contract, rather than in negligence." Slip op. at 16 (citing L. J. Vontz Constr. Co. v. Nebraska, 230 Neb. 377, 432 N.W. 7 (1988); Fuchs v. Parsons Constr. Co., 166 Neb. 188, 88 N.W.2d 648 (1958)). Because PCA owed the Nelsons no duty, fiduciary or otherwise, in its lending relationship with the Nelsons, the district court held that as a matter of law no reasonable jury could find negligence.[5] This appeal followed.

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5 The court went on to review the nine negligence claims presented to the jury to determine whether, assuming a duty did exist, there was sufficient evidence to warrant presenting each claim to the jury. The court concluded that if a subsequent reviewing court did find that the PCA owed the Nelsons a duty when lending them money, then the evidence on six of the nine claims, when viewed in the light most favorable to the Nelsons, was sufficient to justify submitting the negligence question to the jury. Thus, in the event that this

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The district court's decision to enter a judgment notwithstanding the verdict is a ruling of law that we review de novo, and our inquiry is the same as the district court's. Cleverly v. Western Elec. Co., 594 F.2d 638, 641 (8th Cir. 1979) (per curiam).

When reviewing the district court's grant of a judgment notwithstanding the verdict, we:

> 1) consider the evidence in the light most favorable to [the Nelsons], who prevailed with the jury; 2) assume that all conflicts in the evidence were resolved by the jury in [the Nelsons'] favor; 3) assume as proofed all facts which [the Nelsons'] evidence tends to prove; 4) give [the Nelsons] the benefit of all favorable inferences which may reasonably be drawn from the facts proved; and 5) affirm the [grant] of the

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court were to reverse the judgment notwithstanding the verdict based on the negligence issues, the court entered an alternative ruling for a new trial on those six claims.

> motion if reasonable persons could [not] differ as to the conclusions to be drawn from it.

Gilkerson v. Toastmaster, 770 F.2d 133, 136 (8th Cir. 1985).

In Dace v. ACF Industries, 722 F.2d 374, 376 (8th Cir. 1983), we stated the "general proposition that only the evidence favoring the nonmoving party . . . should be considered." We should affirm the lower court judgment notwithstanding the verdict only if "all of the evidence points one way and is susceptible of no reasonable inferences sustaining the position of [the Nelsons]." Robertson Oil Co. v. Phillips Petroleum Co., 871 F2d 1368, 1371 (8th Cir. 1989) (quoting Craft v. Metromedia, Inc., 766 F.2d 1205, 1218 (8th Cir. 1985) (citations omitted), cert. denied, 475 U.S. 1058 (1986)). The submissibility of the various claims involves issues of state law which we are charged to review de novo.

Salve Regina College v. Russell, _____ U.S. _____, _____ S. Ct. _____, 59 U.S.L.W. 4219 (1991).

Applying these principles, we agree with the district court on each of its rulings and affirm the judgment notwithstanding the verdict.[6]

A. Breach of Contract

The Nelsons, in challenging the judgment notwithstanding the verdict, argue that the district court failed to consider

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6 Contrary to the position taken by the dissent, Neither this court nor the district court has substituted a judgment for that of the jury, nor have we eroded the protection of the seventh amendment. The Supreme Court has long held that the question of whether there is sufficient evidence to support submission of an issue to the jury is a legal determination, and that entry of judgment notwithstanding the verdict under Fed. R. Civ. P. 50(b) does not contravene the seventh amendment. Neely v. Martin K. Eby Constr. Co., 386 U.S. 317, 322, 330 (1966). See also, 9 C. Wright & A. Miller, Federal Practice and Procedure §§ 2522, 2524 (1971). We here conclude that, as a matter of law, there was an insufficiency of evidence, and therefore seventh amendment concerns are not implicated. The dissent's reference to the discussion of academicians concerning trends should not deter us from performing our duty.

all the relevant evidence. The district court order, however, exhaustively recounts the testimony of Joe Nelson which might suggest a contract between PCA and the Nelsons. The district court correctly concluded that this testimony "does not support a conclusion that PCA agreed to provide operating capital for the expansion of the Nelsons' ranch operation to full productivity over a three-year period or to restructure the Nelsons' debt situation to permit proper funding of the Nelsons' ranching operation." Slip op. at 10.

We could end our inquiry here. The district court, however, further held that even "[s]tretching the evidence to the point of construing some kind of three year agreement, would still leave the terms of such an agreement too indefinite to permit the enforcement of the contract." Id.

The Nelsons argue that the district court erred by applying North Dakota, rather than Nebraska, law in determining

the enforceability of an oral agreement. They contend that the court erroneously relied on a North Dakota case, Union State Bank v. Woell, 434 N.W.2d 712 (N.D. 1989), which explains the specificity required before Nebraska courts will enforce an oral agreement. The Nelsons point to Davco Realty Co. v. Picnic Foods, Inc., 198 Neb. 193, 252 N.W.2d 142 (1977), in conjunction with Gilbert Central Corp. v. Overland National Bank, 232 Neb. 778, 442 N.W.2d 372 (1989),[7] and argue that Nebraska has its own common law requirements for creating binding oral contracts, and that these requirements are more lenient that [sic] those in Woell. The Nelsons' position is untenable.

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7 Gilbert was decided during the pendency of this appeal, and was not available to the district court when it issued its judgment notwithstanding the verdict. We consider it here because this court is bound by the most recent state court rulings. Hatfield v. Bishop Clarkson Memorial Hosp., 701 F.2d 1266, 1268 (8th Cir. 1983) (en banc).

Gilbert involved a claim of promissory estoppel, and a loan contract in a letter which included "the amount of the loan, the purpose, the parties involved, and the improvement to be financed." Gilbert, 442 N.W.2d at 377. Gilbert does not direct courts to find an enforceable contract when the alleged agreement is based on oral discussions which do not fix a definite amount or specific loan terms.

The Nelsons have not shown that the holding in Gilbert is significantly different from that in Woell. The district court considered whether the terms of the alleged contract were reasonably certain and concluded they were not. "There was no evidence of the total amount to be loaned, or the amount to be loaned in any one year . . ., or how repayment was to be made, or the interest rate to be charged, or when repayments were to be commenced or ended or the nature of the security." Nelson, slip op. at 10. The Nelsons argue that under

Gilbert, oral contract to lend money need not include the interest rate, repayment terms or the nature of the security, but need only include the loan amount, the purpose of the loan, the parties and the improvement to be financed.

The Nelsons' own argument fails, however, because, as the district court correctly held, the discussions between the PCA and the Nelsons never reached any specific agreement about how much money the PCA would lend.

The Nelsons argue that a court should imply a loan amount from the circumstances, that the court should fix the loan amount taking into consideration the prior lending history, and whatever amount they needed to implement the Ranch Plan and make their ranch profitable. Neither the district court, nor this court, however, can engage in such speculation. Indeed, the Nelsons themselves have been unable to predict how much money the need to be profitable. Such

a finding would, in effect, require this court to establish the terms of a loan to be funded by one of the parties to the appeal.

The Nelsons also suggest that the Ranch Plan can provide a basis for the total loan amount. The Nelsons argue that the total amount can be inferred from the fact that they told Mr. Wilnerd that to implement the plan would require 1000 additional cattle in the first year. Yet, cattle prices fluctuate. The number of cattle is only one portion of the Nelsons' ranch expenses, and provides no basis for determining the ranch's total yearly operating expenses. The district court correctly found that PCA and the Nelsons did not agree on a loan amount, and even under Gilbert, this is fatal to the formation of a contract.

B. Misrepresentation

Courts resolve the question of fraud by examining the facts of each case

individually. In the Nelsons' case, the district court carefully evaluated all six of the Nelsons' alleged instances of PCA misrepresentation, and concluded that the evidence, when viewed in the light most favorable to the Nelsons did not justify submitting the issues to the jury; and therefore, judgment notwithstanding the verdict was appropriate.

We have carefully reviewed the district court's analysis of this issue. Contrary to the Nelsons' argument, the district court did not require evidence of direct false statements in order to find a submissible case on this claim. We adopt the district court's analysis in full.

C. Negligence

The district court entered judgment notwithstanding the verdict on the Nelsons' negligence claim because it found that as a matter of law PCA owed no duty to lend money or give advice to the Nelsons. The Nelsons argue that the duty arises from the

status of the parties, from Nebraska common law of lending, from contractual obligations and was voluntarily assumed by PCA.

The district court concluded that while there was no Nebraska law on the issue, the Nebraska Supreme Court would not impose a duty on a lender to use reasonable care in making a loan. Nelson, slip op. at 15. In making our de novo review of this conclusion of the district court, and having carefully considered the briefs and arguments of counsel, we are satisfied that "the district court's analytical sophistication and research have exhausted state-law inquiry." Salve Regina College, 59 U.S.L.W. 4219, _____. Accordingly, we conclude that Nebraska state law would not impose such a duty on PCA.

Second, we cannot conclude the district court erred in finding that PCA owed no contractual duty to the Nelsons. We have affirmed the district court's

decision that there was never any contract between PCA and the Nelsons, except for the yearly short term loans. Accordingly, PCA owed no contractual duty to the Nelsons.

The Nelsons go to great lengths attempting to establish that the duty PCA owed the Nelsons stemmed from circumstances surrounding the oral contract, and not from the specific terms of the contract. The duty, they argue, arises from PCA's status as a cooperative, as an advisor, and from the misleading promises which PCA made to the Nelsons. The Nelsons argue that PCA voluntarily assumed this duty, and breached it, by tricking them into paying down their short-term debt before refusing to lend any more money.[8]

---

8 We would point out that at no time did PCA ever deny any of the Nelsons' loan requests. In the 1985 loan negotiations, PCA required the Nelsons to sign a Memorandum of Understanding whereby the Nelsons agreed to find new short term lenders if they did not earn a $29,000 profit for the coming year. The Nelsons did not make an application for funds in 1986.

Evidence exists that PCA did attempt to advise or counsel the Nelsons. In August 1983, PCA wrote the Nelsons and warned the Nelsons that they would not be able to borrow money in the coming year unless they came up with a plan to improve their cash-flow position and reduce some of their debt. Then, in September, PCA again wrote the Nelsons questioning whether "refinancing your present debt is a solution to the problems that your operation faces." PCA advised the Nelsons to sell another piece of unrelated farm property before borrowing money to pay off the debt.

There is no evidence, however, that the Nelsons [sic] breached any duty they may have had to the Nelsons. No evidence exists suggesting that the PCA participated in developing the Ranch Plan or interfered with the daily operations of the ranch. To the extent that the PCA did attempt to counsel the Nelsons, they were unwilling to

follow that advice. We are persuaded that the district court did not err when it held that no reasonable jury could conclude that PCA owed any special duty to the Nelsons or breached any duty that might have existed.

We affirm the judgment of the district court.

HEANEY, Senior Circuit Judge, dissenting.

In my view, there was more than sufficient evidence from which the jury could find that the PCA had agreed to finance the Nelsons' three-year "ranch plan" prepared by the University of Nebraska Panhandle Station in return for the Nelsons paying down their existing operating loan with the PCA. The record shows that the Nelsons kept their end of the bargain. They went to the Travelers Insurance Company and borrowed $350,000 from the company, giving as security a mortgage on their farm. They then went to the PCA and paid down their operating loan by $240,000. The PCA accepted this

payment, knowing full well that acceptance would be construed by the Nelsons as acceptance of the three-year ranch plan. After receiving the $240,000, however, the PCA reneged on its agreement and refused to fund the ranch plan. The Nelsons then lost their farm, having used up all alternative sources of credit by taking out the Travelers loan.

The Nelsons' farming operation had lost money for several years, and the PCA had the right to insist that its operating loan be paid down. The Nelsons, however, had the right to condition a pay down on a commitment by the PCA to fund them for three additional years if they followed the ranch plan developed by the University of Nebraska.

The majority correctly notes that a finding that an agreement had been reached depended largely on the testimony of Joe Nelson. The jury heard his testimony and that of PCA officials. It accepted

Nelson's version of the facts and found that Nelson and the PCA had entered into a contract. The jury had been carefully instructed about the evidence necessary to find a binding agreement. The instructions are not challenged on appeal and read as follows:

> In order to be binding, an agreement must be definite and certain as to the terms and requirements. It must identify the subject matter and spell out the essential commitments and agreements with respect thereto.
>
> Absolute certainty in the terms of an agreement is not required. Reasonable certainty is necessary. A contract is definite if the parties can tell when it has been performed and it is enough, if when that time arrives, there is in existence some standard by which performance can be tested. In the absence of a stated time for performance, the law will imply a time of performance within a reasonable time under the circumstances.
>
> In determining whether a contract existed, and if so, the terms of that contract, you will be deciding the mutual intent of the parties. In making that determination, you may consider

> the conduct of the parties, oral statements, writings, and all other evidence before you.

These instructions required the jury to find that a definite and certain contract had in fact been entered into between the PCA and Nelson before it could return a verdict in the Nelsons' favor. The jury made this finding and there is abundant evidence to support it.

The Nelsons went to the Federal Land Bank for a loan. Nelson stated that he did go to that bank, and it turned him down. He then went to the Travelers Insurance Company, and it agreed to loan him $350,000 with the farm as security. Travelers also required a $17,500 letter of credit from the PCA. Wayne Goff, the president of the PCA, agreed to supply the letter. Nelson then went back to the PCA. He discussed the matter of Goff. Nelson testified that the following conversation ensued:

> He said that--I asked him if $350,000 was going to be enough, they wanted four hundred to five hundred thousand, and I says is

> that going to be enough to make this plan work, and he says that would be fine.

Appellant's Appendix at 54.

Shortly thereafter, Nelson filled out an application with the PCA for a $453,000 loan. Joseph Nelson testified that Rod Uhrig of the PCA told him and his wife that the PCA would give Nelson an operating loan if he developed a "plan" and paid down the existing operating loan by $500,000. Nelson further testified that he had the plan developed and presented it to Goff and Tom Willnerd, Nelson's loan officer. He recounted that Goff said the plan was probably a pretty good idea but that the PCA could not do anything "until we get money put in here." Goff suggested an amount sufficient to purchase 625 feeder calves. Nelson testified that Willnerd knew that 1,000 calves were necessary to make the plan work and said, "let's do the 625 for now, and I'll get you another four hundred." Appellant's Appendix at 55. On

this basis, the Nelsons signed the loan agreement. The money for the calves, however, was never provided.

Certainly this testimony, coupled with the objective facts, provided ample support for the jury's finding that the PCA agreed to provide operating capital for the expansion of the Nelsons' ranch operation to fuel productivity over a three-year period. Goff, the president of the PCA, was fully aware of the transaction and accepted the $240,000 pay down with full knowledge of the fact that the Nelsons were making the pay down to ensure continued operation of the farm. If there was a problem, Goff had an obligation to inform the Nelsons of the difficulties and clarify the situation before accepting the pay down. Instead, he took the $240,000 and reneged on the agreement. Of course, the jury could have found in favor of the PCA,

but it did not, and neither this court nor the district court should substitute its judgment for theirs.[9]

The majority also adopts the district court's view that if there was a three-year agreement to provide operating capital to the Nelsons, its terms were too indefinite to permit enforcement of the contract. The jury did not believe this to be the case after hearing both sides of the question, and neither do I. The agreement was to fund the "plan" prepared by the University for a period of three years. Repayment was to be made from operating profits with interest at the rate the PCA customarily charged to farm borrowers. The PCA was to have as security all livestock and farm machinery and other farm personalty just as

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9 The majority's and lower court's decisions are part of an unfortunate trend that is eroding the protections of the seventh amendment. Appellate reversals of jury fact-finding, once relatively rate, are now occurring more frequently. See Schapper, Judges Against Juries--Appellate Review of Civil Jury Verdicts, 1989 Wis. L. Rev. 237.

it had on other similar farm loans. Faced with a similar agreement in National Farmers Org. v. Kinsley Bank, 731 F.2d 1464 (10th Cir. 1984), the court stated:

> The rate of interest and the terms of repayment could be determined by reference to commercial practice and the customary course of business between the bank and Burkhart. The market rate of interest and the purpose of the loan would be reasonable guidelines for setting the rate of interest and terms of repayment.

Id. at 1470. We should apply the same standard here.

I turn next to the question of damages. The PCA argued that because the Nelsons' farming operation had not been profitable in the past, it would not be profitable in the future. This same argument was advanced before the jury and rejected. We should do the same. An expert witness testified that if the plan were fully implemented, the farm would be profitable. In addition, the jury had before it detailed financial data from the

PCA and the Nelsons. This data provided ample support for the jury's verdict. We should not substitute our judgment for that of the jury.

This was a close case. Obviously, the district court believed that the Nelsons had not proven their case. Had it been the fact finder, we certainly could not say that a finding of no contract would have been clearly erroneous, but the district court was not the finder of fact.

Finally, I would set aside the trial court's order for a new trial. This order was based on the same reasoning that it used in granting the judgment notwithstanding jury verdict, reasoning which I reject. I would reverse the judgment of the district court granting the PCA's motion for judgment notwithstanding verdict and, in the alternative, a new trial, and would direct that the jury verdict be reinstated. I do not believe

that it was appropriate for the court to substitute its judgment for that of the jury in this case.

A true copy.

Attest:

Clerk, U.S. Court of
Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JOE NELSON
and MARGARET NELSON, USCA No. 89-2554NE

Plaintiffs /Appellants, District Ct. No. CV88-L-238

v.

PRODUCTION CREDIT ASSOCIATION
OF THE MIDLANDS,

Defendant /Appellee.

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING, EN BANC

AND

PETITIONERS' APPENDIX

Prepared and Submitted by:

David H. Hahn, #16573
of HAHN LAW OFFICE
Attorney for Plaintiffs/Appellants
245 South 84th Street, Suite 212
Lincoln, Nebraska 68510
(402) 483-6266

D. Even if this court denies the petition for rehearing and upholds the decision to affirm the trial court, the litigation should not end. This court should remand this case to the District Court for determination of whether a new trial would be reasonable, in light of the plaintiffs' ability to fill in the gaps of the evidence noted by the courts, all in conformity with the seventh amendment.

As part of Nelsons' petition for rehearing and suggestion for rehearing, *en banc*, the Nelsons specifically assert that they should be entitled to a determination by this court, or the trial court, whether a new trial should be granted. The Nelsons assert, that at retrial of this matter, they would be able to submit sufficient

evidence to overcome any concerns expressed by the District Court and this court in its ruling on the applicable state law.

While this approach may, at first reading, appear somewhat irregular, it is firmly grounded in Seventh Amendment jurisprudence. This court has not specifically ruled on the issue of a verdict-winner/appellant asserting a request for new trial at a petition for rehearing and should address this important procedural issue, *en banc*.

In *Neeley v. Eby Construction Co.*, 386 US 316 (1967), the Supreme Court stated that it had the power to grant or deny motions for new trials in appropriate cases. *Neeley* at 323. The Supreme Court stated that ". . . where the court of appeals sets aside the jury's verdict because the evidence was insufficient to send the case to the jury, it is not so clear that the litigation should be terminated." *Neeley* at 327. The court

reasoned that an insufficiency in evidence may be caused by the perceived legal difficulties in the plaintiff's case, which were decided as a matter of law, and not as a matter of fact on the judgment notwithstanding the verdict or a directed verdict. See, *Neeley* at 327, 328. The *Neeley* court specifically stated that "he [plaintiff] may in suitable situations seek rehearing from the court of appeals after his judgment has been reversed." *Neeley* at 329. In this case, the Nelsons desire an opportunity to add additional evidence or to "fill in the gaps" perceived by the trial court after the Nelsons had obtained a verdict and after this court reviewed the Nelsons' attack on the trial court's decision. It is not too late in the proceedings for the Nelsons to take this position. Any earlier attempt by the Nelsons to attack the verdict would have placed the Nelsons in the unfortunate and inappropriate position of attacking the

verdict which they fought so hard to obtain. The trial was the "main event" and the verdict was the result that the Nelsons attempt to preserve the verdict through appeal to this court. However, now that the issue has been decided by the panel, and if the panel's decision is not overturned, the Nelsons suggest that this court should either (1) grant a new trial or (2) remand this case to the District Court for determination of whether the Nelsons can make a sufficient showing that and another trial evidence to justify submission of the cause to the jury would be offered by the Nelsons. See, e.g., *United States v. Lymon*, 125 F2d 67 (1st Cir 1942); *Homeowners Loan Corp. v. Huffman*, 134 F2d 314, 317 (8th Cir 1943). See also, *Kohn v. West Virginia Paper Co.*, 330 US 212 (1947); *O'Hare v. Merck & Co.*, 381 F2d 286 (8th Cir 1967).

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JOE NELSON
and MARGARET NELSON, USCA No. 89-2554NE

Plaintiffs /Appellants, District Ct. No. CV88-L-238

v.

PRODUCTION CREDIT ASSOCIATION
OF THE MIDLANDS,

Defendant /Appellee.

AFFIDAVIT OF DAVID H. HAHN

STATE OF NEBRASKA)
) ss.
COUNTY OF LANCASTER)

I, David H. Hahn, upon my oath do state:

1. I am a resident of the State of Nebraska, more than 21 years of age, and have personal knowledge of the facts set forth in this affidavit.

2. I am an attorney, licensed to practice law in the State of Nebraska before all state courts in the State cf Nebraska, the Nebraska Supreme Court, all federal courts in the State of Nebraska, the Eighth Circuit Court of Appeals, and the Nebraska Bankruptcy Court.

3. I have represented Joseph and Margaret Nelson since 1985. I have represented them in the above-referenced case.

4. I was lead trial counsel in this trial in North Platte, Nebraska.

5. I was lead trial counsel for the preparation of discovery and preparation of this case for trial.

6. Upon my firm conviction as a lawyer and a trial lawyer, I believe that the Nelsons could, if a new trial in this matter were granted, present sufficient facts to allow the Nelsons' claims to go to the jury.

7. I have studied the District Court's opinion granting the motion for judgment notwithstanding the verdict and the panel's decision in this case. I am aware of the deficiencies of the evidence noted by both Judge Urbom and the panel's decision.

8. These evidentiary deficiencies could be overcome at a new trial.

9. In addition to the evidence which was presented at the initial trial, I believe that additional evidence, both documentary and witness evidence, could be proffered to show at least the following facts:

A. A specific course of conduct of the relationship between the Nelsons and the PCA regarding interest rate, term of loan, repayment terms, and the manner in which the amount of the loan was calculated.

B. The general business practice of the PCA, which contemplated roll over of existing debts.

C. Testimony from ex-PCA employees (other than those who testified at trial) that the PCA provides financial counseling in addition to its function as a lender. This is part of its job and part of what it actually does for each member-borrower.

D. That the Nelsons specifically relied upon the advice of the PCA in obtaining mortgage money from Travelers Insurance and paying down the PCA.

E. That it became a standard business practice in the PCA in 1985 and 1986 to obtain as much collateral and pay down as possible from borrowers who the PCA had determined it would collect and close out.

10. In addition to my duty as trial counsel in this case, I have also represented Joseph and Margaret Nelson in their colliery Chapter 12 proceeding.

11. During the course of my work on the Chapter 12 case, the Nelsons have obtained confirmation of a plan of reorganization. The plan of reorganization was confirmed on December 19, 1990. The plan contemplates the full payment of the judgment obtained by the Production Credit Association of the Midlands in the amount of $430,000.00. Over $200,000.00 of the $430,000.00 claim has already been paid to the PCA, in cash. The balance is set for payment over term, with PCA remaining fully secured on real estate and equipment. PCA has accepted the terms of the plan as full and final payment on its claim and have consented that the Nelsons' recovery in this action will be available to the

debtors, in their discretion, in their farming and ranching operation, or to pay other creditors.

12. I have consulted with Joseph and Margaret Nelson and they are prepared to go forward with this case on a new trial and on a showing, if necessary, to the District Court on an evidentiary hearing that they will be able to proffer sufficient testimony to present issues to a jury, if a second trial were held.

Further Affiant Sayeth Not.

_____
David H. Hahn, Affiant

SUBSCRIBED and sworn to before me this _____ day of _____, 1991.

_____
Notary Public

gnaf0891

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-2554NE

JOE NELSON
and MARGARET NELSON,

Appellants,

v.

PRODUCTION CREDIT
ASSOCIATION OF THE
MIDLANDS,

Appellee.

Order Denying Petition For Rehearing and Suggestion Rehearing En Banc

Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc. Judge Beam took no part in the consideration or decision of the petition.

Petition for rehearing by the panel is also denied.

May 17, 1991

Order Entered at the Direction of the Court:

Michael E. Gans /s/

Clerk, U.S. Court of Appeals, Eighth Circuit.

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April 29, 1991

VIA FEDERAL EXPRESS
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Mr. Michael Gans
Acting Clerk of Court
Eighth Circuit Court of Appeal
U.S. Court and Custom House
1114 Market Street
St. Louis, Missouri 63101

Re: 89-2554NE
Joe Nelson, et al. v. PCA of Midlands
Our File No. 86-023-08

Dear Mr. Gans:

Pursuant to FRAP 28(j) the appellants, Joe and Margaret Nelson, submit the following supplemental authority to be considered in conjunction with the appellants' petition for rehearing, which was filed on April 23, 1991.

Appellant cites *Hecker v. Ravenna Bank*, 237 Neb 810 (_____ NW2d _____) (April 12, 1991) for further support of its contract claim argued at page 4 of its petition for rehearing. The appellant cites *Hecker* to the Court, because it states that Nebraska law does not require the type of specificity in oral contracts to loan money as found by the District Court (District Court decision, p 2; appendix to petition for rehearing, pp 32-33); and affirmed by the panel in its decision (panel decision, pp 9-11; appendix to appellants' petition for rehearing, pp 62-64). Appellants urge a reading of the *Hecker* case in support of their argument that there was a valid and enforceable contract to loan money under Nebraska law, and the court does not need to rely on case law from other jurisdictions, such as North Dakota.

Because this case has not been cited in the Northwest Reporter, I enclose a copy from the Nebraska Advance Sheets. I enclose the original and eighteen (18) copies of this letter, together with a photocopy of the *Hecker* case, for distribution together with the recently filed petition for rehearing.

I thank you in advance for your attention to this matter.

Very truly yours,

David H. Hahn
Attorney at Law

DHH/akj
pc: Howard Olsen
Steve Olsen
Client

PAUL A. HECKER, APPELLANT, V. THE RAVENNA BANK, A BANKING CORPORATION, ET AL., APPELLEES.
ARNOLD C. HECKER, APPELLANT, V. THE RAVENNA BANK, A BANKING CORPORATION, ET AL., APPELLEES.

_____N.W.2d_____

Filed April 12, 1991. Nos. 88-866, 88-867.

1. **Demurrer: Pleadings.** When ruling on a demurrer, a court must assume that the pleaded facts, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of a fact not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial.
2. **Contracts: Consideration.** Sufficient and valid consideration is essential to an enforceable express contract.
3. **Actions: Breach of Contract: Consideration.** For a cause of action based on a breach of express contract, there must be an unconditional and absolute acceptance of a definite offer constituting an agreement supported by sufficient and valid consideration.
4. **Corporations: Liability: Debtors and Creditors.** Generally, a corporation's directors or officers are not liable to the corporation's creditors or third persons for corporate acts or debts, simply by reason of an official relation with the corporation.
5. **Corporations: Contracts: Liability.** As a general rule, concerning liability on a corporate contract, a corporation's directors or officers are in the same position as agents of private individuals and are not personally liable on a corporation's contract unless the corporate directors or officers purport to bind themselves, or have otherwise bound themselves, to performance of the contract.
6. **Banks and Banking: Negotiable Instruments: Words and Phrases.** A cashier's check is a bill of exchange drawn by a bank on itself; hence, issuance of a cashier's check constitutes acceptance by the issuing bank.
7. **Negotiable Instruments: Conversion.** A negotiable instrument can be the subject of conversion.
8. **Property: Conversion: Words and Phrases.** Conversion is the unauthorized and wrongful dominion over personal property owned by another, which is exerted as a denial of or inconsistent with the owner's rights in the property or is asserted in derogation, exclusion, or defiance of another's ownership or title in personal property.
9. **Uniform Commercial Code: Negotiable Instruments: Conversion.** Neb. U.C.C. § 3-419 (Reissue 1980) supplies examples of ways in which a negotiable instrument may be converted, and does not list the elements which constitute tortious conversion of a negotiable instrument.
10. _____: _____: _____. Neb. U.C.C. § 3-419 (Reissue 1980) does not displace the common-law action for conversion of a negotiable instrument, but coexists with Nebraska's common law.

Petitioners' Appendix
Page 113

11. **Corporations: Liability: Conversion.** A corporation's officer or agent is personally liable if the officer or agent causes a conversion of another's property, and it is no defense that such officer or agent converted the property while acting for the corporation.
12. **Uniform Commercial Code: Banks and Banking: Negotiable Instruments: Liability.** Neb. U.C.C. § 4-402 (Reissue 1980) provides that a payor bank is liable to its customer for damages proximately caused by the wrongful dishonor of an item.
13. **Uniform Commercial Code: Negotiable Instruments: Words and Phrases.** Generally, payees of a cashier's check are not "customers" under Neb. U.C.C. § 4-104(1)(e) (Reissue 1980).
14. **Banks and Banking: Negotiable Instruments: Words and Phrases.** Wrongful refusal to honor a cashier's check occurs when a payee of a cashier's check delivers or negotiates the check for payment, and the issuing bank refuses to honor the check.
15. **Actions: Parties: Joinder.** Causes of action involving different defendants cannot be joined unless each cause affects them all and they have a joint or common liability or interest.
16. **Actions: Parties: Joinder: Contracts.** Joint obligees must sue jointly in actions ex contractu.
17. **Motions to Strike: Pleadings.** A motion to strike a petition, pursuant to Neb. Rev. Stat. § 25-913 (Reissue 1989), is not a substitute for a demurrer under Neb. Rev. Stat. § 25-806 (Reissue 1989) or for a motion to strike or make more definite and certain as authorized by Neb. Rev. Stat. § 25-833 (Reissue 1989).
18. _____: _____. A motion to strike a petition, pursuant to Neb. Rev. Stat. § 25-913 (Reissue 1989), may be directed only to a petition filed in violation of a court's order or a rule of practice or procedure prescribed either by statute or by the court in which the petition is filed.

Appeals from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

John S. Mingus, of Mingus & Mingus, for appellants.

Wesley C. Mues, of Knapp, Mues, Beavers & Luther, for appellees.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

SHANAHAN, J.

In March 1986, Paul A. Hecker and Arnold C. Hecker commenced actions against The Ravenna Bank; Dale E. Pohlmann, the bank's president; and James H. Oliver, chairman of the bank's board of directors. The actions related,

first, to an oral agreement between Heckers and Ravenna Bank for credit and financing and, second, to a cashier's check payable to "Paul Hecker and Arnold Hecker and John Mingus." After a series of amended petitions, Heckers, in March 1988, each filed a "Fifth Amended Petition." When the district court for Buffalo County sustained demurrers to the amended petitions, Heckers elected to stand on their pleadings. The court dismissed Heckers' actions; hence, these appeals. We affirm in part, and in part reverse.

STANDARD OF REVIEW

" 'In reviewing an order sustaining a demurrer, the Supreme Court accepts the truth of facts well pled and the factual and legal inferences which may be reasonably deduced from such facts, but does not accept conclusions of the pleader.' " *Security Inv. Co. v. State*, 231 Neb. 536, 538, 437 N.W.2d 439, 442 (1989).

> When ruling on a demurrer, a court must assume that the pleaded facts, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of a fact not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial.

Schuyler State Bank v. Cech, 228 Neb. 588, 593, 423 N.W.2d 464, 468 (1988). Accord *Parrett v. Platte Valley State Bank*, 236 Neb. 139, 459 N.W.2d 371 (1990).

THE HECKERS' LAST AMENDED PETITIONS

Factual Background.

According to Heckers, all activities and conduct in question occurred in response to Ravenna Bank's "policies concerning loans and business dealings" with Heckers. At all times in any transaction related to Heckers' lawsuits, Pohlmann and Oliver were acting in their official bank capacities and at the "Ravenna Bank's behest." Such "behesting" was alleged in each of the four "causes of action" contained in Heckers' fifth, and last, amended petitions, "causes of action" which will be designated and discussed after our review of facts which, under the particular standard of review, "are true as alleged [with] the

benefit of any reasonable inference from the facts alleged . . . ." *Schuyler State Bank v. Cech, supra* at 593, 423 N.W.2d at 468.

Heckers own a farm and livestock operation. In 1975, Ravenna Bank orally agreed to loan money or extend credit to Heckers for their operating expenses and advise them regarding financial matters pertinent to their business. Heckers agreed that Ravenna Bank would be their "sole lending institution" and that they would abide by the bank's determinations and business directives based on semiannual reviews of the Hecker operations.

During a semiannual review meeting in January 1982 and as a condition for further bank credit, Ravenna Bank required that Heckers' mother guarantee part of Heckers' debt to the bank. After Heckers supplied the guaranty, Ravenna Bank promised to "pay for" agricultural expenses subsequently incurred by Heckers, including their fertilizer, chemical, and fuel bills, but then reneged on that promise. On March 18, 1983, Ravenna Bank

> wrongfully convert[ed] a cashier's check # 25783 in the sum of $ 93,442.66, the maker thereof being the Ravenna Bank, Remitter, Mike Dobish, payees being Paul Hecker, Arnold Hecker and John Mingus, by stopping payment of said cashier's check and applying it to the outstanding loan of Arnold C. Hecker and Paul A. Hecker in lieu of honoring the payment of the same to the aforesaid designated payees thereon . . . .

Without Heckers' consent, proceeds from the cashier's check were applied on Heckers' debt to Ravenna Bank.

Causes of Action.

Heckers alleged four "causes of action." The first cause of action was based on a breach of the oral contract for an extension of credit or a bank loan to Heckers, the second was "wrongful conversion" of the cashier's check, the third was "wrongful dishonor" of the cashier's check under Neb. U.C.C. § 4-402 (Reissue 1980), and the fourth was "wrongful refusal" to honor the cashier's check. Heckers claimed several items of damage, but did not seek judgments for recovery of the proceeds from the cashier's check.

Appellees' Pleadings.

In response to demurrers directed to each "Fourth Amended Petition" of the Heckers, the court, on February 26, 1988, granted Heckers 20 days to file additional amended petitions. Within the 20 days, each of the Heckers filed a "Fifth Amended Petition." Pursuant to Neb. Rev. Stat. § 25-913 (Reissue 1989) (pleadings stricken), the appellees requested that the Heckers' fifth amended petitions, in their entirety, be stricken because those petitions were "filed in direct violation of this Court's order of February 26, 1988 . . . ." Also, the appellees demurred to Heckers' amended petitions and claimed, among other things, that Heckers improperly joined several causes of action and that their petitions failed to state facts sufficient to constitute a cause of action. See Neb. Rev. Stat. § 25-806(5) (Reissue 1989) (causes of action improperly joined) and § 25-806(6) (factual failure to state a cause of action).

Judgments.

The district court sustained the demurrers and motions to strike Heckers' fifth amended petitions in their entirety, but granted Heckers leave to amend their petitions. When Heckers declined to replead and stood on the allegations in their fifth amended petitions, the court dismissed Heckers' actions.

ASSIGNMENTS OF ERROR

Most of Heckers' assignments of error are repetitive or not discussed in their briefs. See, Neb. Ct. R. of Prac. 9D(1)d and g (rev. 1989); *Federal Land Bank of Omaha v. Victor*, 232 Neb. 351, 440 N.W.2d 667 (1989) (for appellate consideration, appellant must assign and argue errors claimed for reversal). Nevertheless, Heckers contend that the district court erred (1) in sustaining the demurrers and (2) in striking their entire amended petitions.

DISMISSAL OF THE AMENDED PETITIONS

The first question is whether Heckers stated facts sufficient to constitute a cause of action.

Breach of Oral Agreement to Extend Credit.

> " 'To establish an express contract, there must be shown what amounts to a definite proposal and an

> unconditional and absolute acceptance thereof. . . .
>
> " 'Further, in order that a binding contract may result from an offer and acceptance, it is essential that the minds of the parties meet at every point, and that nothing be left open for a future arrangement.' "

Professional Recruiters v. Oliver, 235 Neb. 508, 513, 456 N.W.2d 103, 107 (1990) (quoting from *Zimmerman v. Martindale*, 221 Neb. 344, 377 N.W.2d 94 (1985)).

Moreover, sufficient and valid consideration is essential to an enforceable express contract. *Blanchard v. White*, 217 Neb. 877, 351 N.W.2d 707 (1984). See, also, 17A Am. Jur. 2d *Contracts* § 117 (1991). In *Buckingham v. Wray*, 219 Neb. 807, 809, 366 N.W.2d 753, 756 (1985), we stated:

> [C]onsideration is sufficient to support a contract if there is any detriment to the promisee or benefit to the promisor. Generally, a court will not inquire into the adequacy of consideration for a contract, inasmuch as consideration based on value of property or performance of a promise is a matter of personal judgment by parties to a contract. Ordinarily, a contract will not be held invalid for inadequacy of consideration alone, unless inadequacy is so great as to furnish of itself evidence of fraud.

Thus, for a cause of action based on a breach of express contract, there must be an unconditional and absolute acceptance of a definite offer constituting an agreement supported by sufficient and valid consideration. Cf. *Garsick v. Dehner*, 145 Neb. 73, 79, 15 N.W.2d 235, 238 (1944):

> Speaking generally, mutuality of obligation is an essential element of every enforceable agreement. However, "Mutuality of contract consists in the obligation of each party to do, or to permit something to be done, in consideration for the act or promise of the other. . . . Mutuality is absent when one only of the contracting parties is bound to perform, and the rights of the parties exist at the option of one only."

Accord *De Los Santos v. Great Western Sugar Co.*, 217 Neb. 282, 348 N.W.2d 842 (1984).

Heckers alleged that Ravenna Bank offered to extend credit or make a loan to Heckers and provide them with financial

advice in exchange for Heckers' use of the bank as their sole source of credit. Heckers further alleged their compliance with all bank instructions and requests, such as the maternal guaranty, thereby satisfying a condition precedent to Ravenna Bank's obligation to extend credit or loan money to the Heckers. See *Frenzen v. Taylor*, 232 Neb. 41, 48, 439 N.W.2d 473, 478 (1989): "When a contractual duty is subject to the occurrence of a specific contingency or event as a condition, the condition must occur before a party is obligated to perform the contractual duty unless nonoccurrence is excused." See, also, Neb. Rev. Stat. § 25-836 (Reissue 1989) (pleading performance of conditions precedent). Heckers then alleged that Ravenna Bank refused to keep its promise to "pay for" Heckers' 1982 business expenses. Therefore, Heckers alleged facts sufficient to state a breach of contract cause of action against Ravenna Bank. Consequently, the district court's judgments, sustaining demurrers for failure to state a breach of contract cause of action against Ravenna Bank, are incorrect.

Generally, a corporation's directors or officers are not liable to the corporation's creditors or third persons for corporate acts or debts, simply by reason of an official relation with the corporation. See, *Hilzendager v. Skywarok*, 335 N.W.2d 768 (N.D. 1983); *A. B. Corporation v. Futrovsky*, 259 Md. 65, 267 A.2d 130 (1970); *Stratton v. West States Construction*, 21 Utah 2d 60, 440 P.2d 117 (1968); *Kiel v. Frank Shoe Mfg. Co.*, 245 Wis. 292, 14 N.W.2d 164 (1944).

As a general rule, concerning liability on a corporate contract, a corporation's directors or officers are in the same position as agents of private individuals and are not personally liable on a corporation's contract unless the corporate directors or officers purport to bind themselves, or have otherwise bound themselves, to performance of the contract. See, *Wyatt v. Union Mortg. Co.*, 24 Cal. 3d 773, 598 P.2d 45, 157 Cal. Rptr. 392 (1979); *Staffco, Inc. v. Maricopa Trading Co.*, 122 Ariz. 353, 595 P.2d 31 (1979); *A. B. Corporation v. Futrovsky, supra*; *Revere Press, Inc. v. Blumberg*, 431 Pa. 370, 246 A.2d 407 (1968). See, also, 18B Am. Jur. 2d *Corporations* § 1829 (1985). In *Edwin Bender & Sons v. Ericson Livestock Comm. Co.*, 228 Neb. 157, 164, 421 N.W.2d 766, 771 (1988), we said:

" ' "[W]here an obligation is that of a principal, a court cannot enforce the obligation against the agent as long as he is merely acting as agent." . . .' " See, also, *Savorelli v. Stone*, 168 Neb. 419, 428, 96 N.W.2d 222, 227 (1959): " 'Where one acting as the agent of a corporation makes a contract on its behalf, which is binding upon it, his acts in that behalf create no individual or personal liability against him.' " (Quoting from *Fremont Carriage Mfg. Co. v. Thomsen*, 65 Neb. 370, 91 N.W. 376 (1902).)

Heckers failed to allege facts, either as an express statement or as a basis for the inference, that Pohlmann and Oliver personally and in their individual capacities bound themselves to the credit or loan agreement involving Ravenna Bank. Consequently, Heckers failed to state a cause against Pohlmann and Oliver for breach of the credit or loan agreement in question. The district court correctly sustained the Pohlmann-Oliver demurrers to the breach of contract cause of action.

Conversion of the Cashier's Check.

A cashier's check is a bill of exchange drawn by a bank on itself; hence, issuance of a cashier's check constitutes acceptance by the issuing bank. See, *Thompson Poultry, Inc. v. First Nat. Bank of York*, 199 Neb. 8, 255 N.W.2d 856 (1977); *John Deere Co. v. Boelus State Bank*, 233 Neb. 818, 448 N.W.2d 163 (1989); 6 J. Reitman, H. Weisblatt, W. Schlichting, T. Rice & J. Cooper, Banking Law §§ 123.04 and 120.02 (1991) (hereinafter 6 Banking Law); 10 Am. Jur. 2d *Banks* § 544 (1963).

A cashier's check is a "negotiable instrument" in accord with Neb. U.C.C. § 3-104 (Reissue 1980). "A negotiable instrument can be the subject of conversion." *Bryant Heating v. United States Nat. Bank*, 216 Neb. 107, 113, 342 N.W.2d 191, 195 (1983). Accord *State v. Omaha Nat. Bank*, 59 Neb. 483, 81 N.W. 319 (1899). See, also, Neb. U.C.C. § 3-419 (Reissue 1980), which provides that

> [a]n instrument is converted when
>
> (a) a drawee to whom it is delivered for acceptance refuses to return it on demand; or

(b) any person to whom it is delivered for payment refuses on demand either to pay or to return it; or

(c) it is paid on a forged indorsement.

In Nebraska's common law, conversion "is the unauthorized and wrongful dominion over personal property owned by another, which is exerted as a denial of or inconsistent with the owner's rights in the property or is asserted in derogation, exclusion, or defiance of another's ownership or title in personal property." *Mason v. Schumacher*, 231 Neb. 929, 944, 439 N.W.2d 61, 71 (1989).

Section 3-419 supplies examples of ways in which a negotiable instrument may be converted, and does not list the elements which constitute tortious conversion of a negotiable instrument. *Fuscellaro v. Industrial Nat'l Corp.*, 117 R.I. 558, 368 A.2d 1227 (1977); *Yeager & Sullivan, Inc. v. Farmers Bank*, 162 Ind. App. 15, 317 N.E.2d 792, 797 (1974). See Neb. U.C.C. § 3-102 (Reissue 1980) ("instrument" means "negotiable instrument").

Neb. U.C.C. § 1-103 (Reissue 1980) states: "Unless displaced by the particular provisions of this act, the principles of law and equity . . . shall supplement its provisions." Therefore, § 3-419 does not displace the common-law action for conversion of a negotiable instrument, but coexists with Nebraska's common law. See *PWA Farms v. North Platte State Bank*, 220 Neb. 516, 371 N.W.2d 102 (1985). See, also, *Bryant Heating v. United States Nat. Bank, supra* (common-law principles simultaneously applied with § 3-419). Cf. *Brown v. United States Nat. Bank*, 220 Neb. 684, 371 N.W.2d 692 (1985) (material elements of common-law fraud must be established before any relief is available for "fraud" contemplated by Neb. U.C.C. § 5-114(2) (Reissue 1980), which does not specifically identify the elements of fraud).

The payee of a cashier's check is the rightful "owner" of the check, which is "property" that may be the subject of tortious conversion. See § 3-419, comment 2:

> A negotiable instrument is the property of the holder. It is a mercantile specialty which embodies rights against other parties, and a thing of value. This section adopts the generally recognized rule that a refusal to return it on

> demand is a conversion. The provision is not limited to drafts presented for acceptance, but extends to any instrument presented for payment, including a note presented to the maker. The action is not on the instrument, but in tort for its conversion.

See, also, 1 J. White & R. Summers, Uniform Commercial Code § 15-4 (3d ed. 1988).

Heckers alleged that Ravenna Bank refused Heckers' demand to pay the cashier's check on which Heckers were designated as payees, a refusal which resulted in Heckers' damages. Moreover, without Heckers' consent, Ravenna Bank applied the proceeds of the cashier's check on Heckers' indebtedness to the bank. An issuing bank's refusal on demand to pay a cashier's check is not only a distinct act of dominion wrongfully asserted over the payee's property in denial of or inconsistent with property rights of the payee, but is also specifically listed as a conversion defined in § 3-419(1)(b). Heckers alleged facts sufficient to constitute a cause of action for Ravenna Bank's conversion of the cashier's check. For that reason, the court improperly sustained Ravenna Bank's demurrers based on a failure to state a cause of action for conversion.

A corporation's officer or agent is personally liable if the officer or agent causes a conversion of another's property, and it is no defense that such officer or agent converted the property while acting for the corporation. See, *Lyon v. Bennington College Corp.*, 137 Vt. 135, 400 A.2d 1010 (1979); *Bush v. Hayes*, 286 Mich. 546, 282 N.W. 239 (1938); *Clark v. Groger*, 102 Wash. 188, 172 P. 1164 (1918). See, also, 18 Am. Jur. 2d *Conversion* § 73 (1985). Cf., *Morfeld v. Bernstrauch*, 216 Neb. 234, 239, 343 N.W.2d 880, 883 (1984) ("[a]n agent is personally liable to third persons for his own misfeasances and positive wrongs"); *Standard Grain Co. v. State Bank*, 106 Neb. 73, 182 N.W. 507 (1921).

Heckers alleged that Pohlmann and Oliver, although acting for Ravenna Bank, nonetheless refused to pay the cashier's check after Heckers had delivered the check to Ravenna Bank for payment and that Pohlmann and Oliver, after "stopping payment" on the check, applied the check proceeds on Heckers'

unpaid loan from the bank. Thus, Heckers alleged sufficient facts to constitute a cause of action against Pohlmann and Oliver for conversion of the cashier's check. Consequently, the court improperly sustained the Pohlmann-Oliver demurrers based on a failure to state a cause of action for conversion.

Wrongful Dishonor of the Cashier's Check.

Heckers' cause of action for "wrongful dishonor" is based on § 4-402, which provides that a "payor bank is liable to its customer for damages proximately caused by the wrongful dishonor of an item." A customer is statutorily defined as "any person having an account with a bank or for whom a bank has agreed to collect items and includes a bank carrying an account with another bank." Neb. U.C.C. § 4-104(1)(e) (Reissue 1980). A cashier's check is the primary obligation of an issuing bank, which, as drawer and drawee of the cashier's check, is the bank's own customer. See, *Maddox v. First Westroads Bank*, 199 Neb. 81, 256 N.W.2d 647 (1977); § 4-104(1)(e); 10 Am. Jur. 2d *Banks* § 544 (1963); 6 Banking Law § 133.10. Generally, payees of a cashier's check are not "customers" under § 4-104(1)(e). See *First Amer. Nat. Bank v. Commerce Union Bank*, 692 S.W.2d 642 (Tenn. App. 1985).

Heckers alleged only that they were payees of the cashier's check, but failed to allege that they had an account pertaining to the cashier's check, or that Ravenna Bank had agreed to collect items for Heckers. Thus, Heckers failed to allege that they were "customers" of Ravenna Bank within § 4-104(1)(e). Accordingly, Heckers failed to state facts sufficient to constitute a cause of action under § 4-402 against Ravenna Bank, Pohlmann, or Oliver. The demurrers to the "wrongful dishonor" cause of action were correctly sustained.

Wrongful Refusal to Honor the Cashier's Check.

Although a bank accepts a cashier's check by issuing it, such acceptance does not become operative until delivery or notification. Neb. U.C.C. § 3-410(1) (Reissue 1980). Wrongful refusal to honor a cashier's check occurs when a payee of a cashier's check delivers or negotiates the check for payment, and the issuing bank refuses to honor the check. See, *John Deere Co. v. Boelus State Bank*, 233 Neb. 818, 448 N.W.2d 163

(1989); *Thompson Poultry, Inc. v. First Nat. Bank of York*, 199 Neb. 8, 255 N.W.2d 856 (1977); Neb. U.C.C. § 1-201(14) (Reissue 1980) (" 'Delivery' with respect to instruments, documents of title, chattel paper or securities means voluntary transfer of possession"); Neb. U.C.C. § 3-202(1) (Reissue 1980) ("Negotiation is the transfer of an instrument in such form that the transferee becomes a holder. If the instrument is payable to order it is negotiated by delivery with any necessary indorsement; if payable to bearer it is negotiated by delivery").

From the facts alleged by Heckers, we draw the inference that the necessary endorsements appeared on the cashier's check which Heckers delivered to Ravenna Bank. Heckers then alleged that they were payees for the cashier's check and that Ravenna Bank, the issuing bank, refused to honor the check. Hence, Heckers stated sufficient facts to constitute a cause of action for Ravenna Bank's wrongful refusal to honor the cashier's check drawn on the bank. However, Heckers failed to allege that Pohlmann and Oliver bound themselves, individually and outside their official capacities with Ravenna Bank, to honor the cashier's check. For that reason, Heckers failed to state sufficient facts to constitute a cause of action against Pohlmann and Oliver for "wrongful refusal" to honor the cashier's check.

MISJOINDER OF CAUSES OF ACTION

Section 25-806 provides that the "defendant may demur to the petition only when it appears on its face . . . (5) that several causes of action are improperly joined . . . ." Neb. Rev. Stat. § 25-702 (Reissue 1989) provides that "[e]xcept for product liability actions, the causes of action so united must affect all the parties to the action, and not require different places of trial." In *Ravenna Bank v. Custom Unlimited*, 223 Neb. 540, 545, 391 N.W.2d 557, 561 (1986), we stated, " '[C]auses of action involving different defendants cannot be joined unless each cause affects them all and they have a joint or common liability or interest.' " Accord, *Fuchs v. Parsons Constr. Co.*, 166 Neb. 188, 88 N.W.2d 648 (1958); *Sickler v. City of Broken Bow*, 143 Neb. 542, 10 N.W.2d 462 (1943).

Heckers have misjoined some causes of action against

Ravenna Bank, Pohlmann, and Oliver because neither the cause of action for breach of the credit or loan agreement nor the cause of action for wrongful refusal to honor a cashier's check legally relates to Pohlmann and Oliver. The district court's judgments on the issue of a misjoinder of causes of action are correct.

DEFECT OF PARTIES

Section 25-806(4) provides that a "defendant may demur to the petition only when it appears on its face . . . (4) that there is a defect of parties, plaintiff or defendant . . . ." Neb. Rev. Stat. § 25-318 (Reissue 1989) states: "Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason being stated in petition." This court stated that "parties jointly liable must be joined as defendants . . . and of course the same rule would apply as to plaintiffs. . . . [J]oint obligees must sue jointly in actions *ex contractu* . . . ." *Harker v. Burbank*, 68 Neb. 85, 89, 93 N.W. 949, 950 (1903).

Payees of the cashier's check were Paul Hecker, Arnold Hecker, and John Mingus. Heckers failed to join Mingus as a plaintiff or, in accord with § 25-318, as a defendant. Thus, Heckers' petitions contain a defect of parties regarding an action based on the jointly payable cashier's check. The district court's judgments regarding a defect of parties are correct.

MOTION TO STRIKE

Section 25-913 provides that "[m]otions to strike pleadings and papers from the files may be made with or without notice, as the court or judge shall direct." In *Ferson v. Armour & Co.*, 109 Neb. 648, 192 N.W. 125 (1923), the plaintiff filed a 400-page petition followed by three amended petitions over a 4-year period. This court characterized the *Ferson* pleading as

> inflammatory language, conclusions of fact and law, redundant allegations, unnecessary repetitions, scandal, private chat, personal episodes, evidence, criminal charges and other extraneous matters having no legitimate relation to the stating of a cause of action for damages. These flagrant violations of the rules of pleading stand out

> conspicuously on the face of the petition. . . .
>
> . . . .
>
> . . . Litigants and counsel alike are answerable to the court for violating established rules of procedure and orders made in regard to pleadings. Plaintiffs' fourth petition not only violated established rules, but it was filed in contempt of court. In a situation like this defendants are not limited to the statutory method of attacking the petition by motion to strike out improper matter or to make allegations more definite and certain. . . . It may be stricken from the files, if fatal defects extend to the pleading as a whole, or if plaintiffs in filing it ignored an order of the court. . . . [However, this power to strike pleadings and papers] should be sparingly exercised. Otherwise innocent suitors may suffer from the mistakes or the contumacy of attorneys whom the court itself has licensed to practice law.

Ferson, supra at 649, 651, 192 N.W. at 126-27.

The *Ferson* court declared that a trial court properly struck an entire petition as a violation of a court order and a rule of pleading, namely, a petition must contain "[a] statement of the facts constituting the cause of action, in ordinary and concise language, and without repetition." Comp. Stat. § 8608 (1922). See, also, Neb. Rev. Stat. § 25-804 (Reissue 1989).

In *Lewin v. Lewin*, 174 Neb. 596, 119 N.W.2d 96 (1962), this court held that a motion to strike a petition should be treated as a demurrer, and added that "[a] petition which shows on its face that a cause of action could not be stated by amendment appears to be [vulnerable to a motion to strike the pleading]." 174 Neb. at 602, 119 N.W.2d at 100. We now limit the preceding expression in *Lewin* and declare that a motion to strike a petition, pursuant to § 25-913, is not a substitute for a demurrer under § 25-806 or a motion to strike or make more definite and certain as authorized by Neb. Rev. Stat. § 25-833 (Reissue 1989). A motion to strike a petition, pursuant to § 25-913, may be directed only to a petition filed in violation of a court's order or a rule of practice or procedure prescribed either by statute or by the court in which the petition is filed.

In the present case, the appellees moved to strike Heckers'

fifth amended petitions as violations of the court orders, issued on February 26, 1988, which provided that Heckers were "hereby granted twenty (20) days from this date to file his Fifth Amended Petition or may stand on his Fourth Amended Petition . . . ." Heckers complied with the orders by filing their amended petitions within 20 days. Yet, the district court sustained the motions to strike. Although Heckers each filed five amended petitions over 2 years, we are not directed to any rule of practice or procedure, prescribed by statute or by rule of the district court, which prohibited Heckers' repetitive pleading. Therefore, Heckers' last amended petitions violated neither a court order nor a rule of practice or procedure. Thus, Hecker's fifth amended petitions were not subject to a motion to strike pursuant to § 25-913. Hence, the district court improperly struck Heckers' fifth amended petitions.

CONCLUSION

For the reasons expressed above, we affirm the district court's judgments sustaining Ravenna Bank's demurrers concerning misjoinder of the breach of contract actions against the bank with the breach of contract actions against Pohlmann and Oliver, sustaining the demurrers concerning a defect of parties for the conversion actions, sustaining the demurrers regarding misjoinder of the causes of action for breach of contract and "wrongful refusal" to honor the cashier's check, and sustaining the demurrers relative to a defect of parties regarding the "wrongful refusal" actions. Accordingly, we sustain the district court's dismissal of the "wrongful dishonor" actions against Ravenna Bank.

Further, we affirm the district court judgments sustaining the Pohlmann-Oliver demurrers pertaining to the breach of contract actions, the "wrongful dishonor" actions, and the "wrongful refusal" actions and, thus, affirm dismissal of those actions against Pohlmann and Oliver. Additionally, we affirm the district court's judgments sustaining the Pohlmann-Oliver demurrers regarding a defect of parties for the conversion action.

However, we reverse the district court's dismissal of Heckers' breach of contract actions against Ravenna Bank; the

conversion actions against the bank, Pohlmann, and Oliver; and the "wrongful refusal" against the bank; hence, we remand these particular causes, immediately aforementioned, for further proceedings. We do not decide the propriety of joining the specific causes of action mentioned in this paragraph because the issue, as far as we are able to glean from the record, was never presented to the district court.

Finally, we reverse the district court's judgments striking Heckers' fifth amended petitions in their entirety, that is, Heckers' "last amended petitions," which eventually may become actuality or simply be an expression of hope by this court.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

TUTTLE & ASSOCIATES, INC., APPELLANT, V. H. LEE GENDLER, TRUSTEE, ET AL., DEFENDANTS AND THIRD-PARTY PLAINTIFFS; CHADSEY ARCHITECTS, INC.; AND AMERACORP, INC., ET AL., THIRD-PARTY DEFENDANTS, APPELLEES.

_____N.W.2d_____

Filed April 12, 1991. No. 88-934.

1. **Summary Judgment: Appeal and Error.** In considering evidence on a motion for summary judgment, both this court and the trial court must determine whether there is any genuine issue as to any material fact, whether the ultimate inferences to be drawn from those facts are clear, and whether the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record show that no genuine issue exists as to any material fact or as to the ultimate inferences that may be drawn from any material fact and that the moving party is entitled to judgment as a matter of law.
3. **Summary Judgment: Proof.** A party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists. Thereafter, the burden of producing contrary evidence shifts to the party opposing the motion.
4. **Summary Judgment: Real Estate: Vendor and Vendee: Liens: Foreclosure:**